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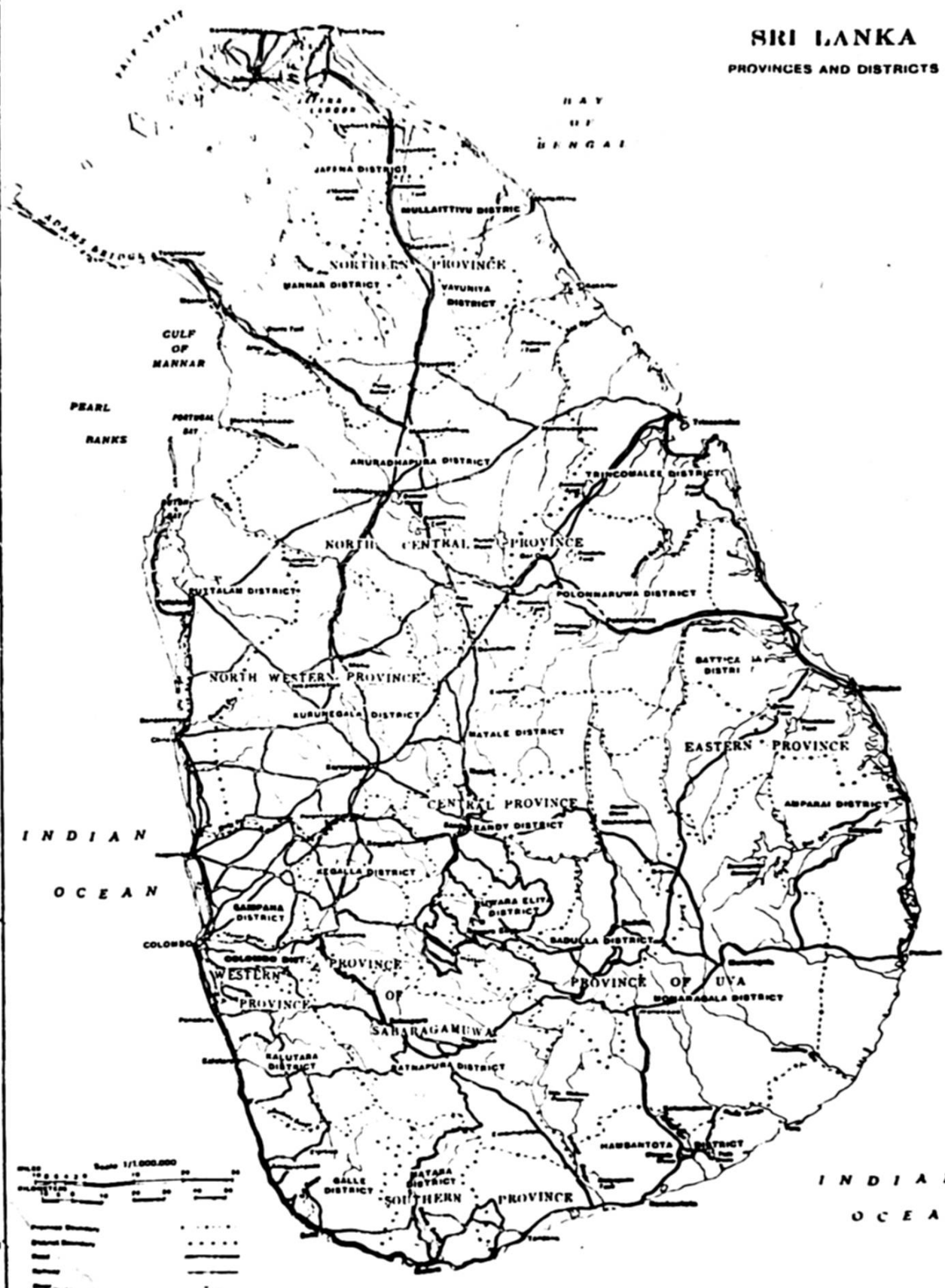
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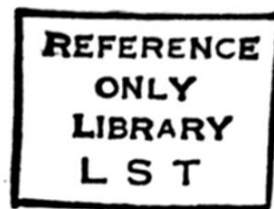
Law & Society Trust

# SRI LANKA

## PROVINCES AND DISTRICTS







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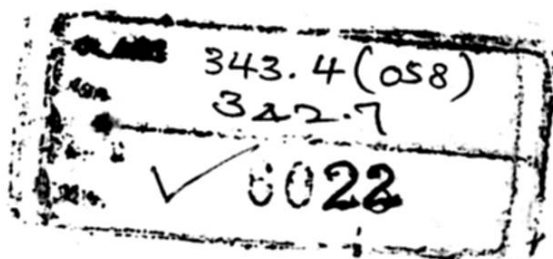
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# List of abbreviations and acronyms

|                                     |   |
|-------------------------------------|---|
| <i>A/L</i>                          | <i>Advance Level (of the General Certificate of Education Examination)</i>                  |
| <i>ADB</i>                          | <i>Asian Development Bank</i>   |
| <i>AG</i>                           | <i>Attorney General</i>   |
| <i>AI</i>                           | <i>Amnesty International</i>  |
| <i>AIDS</i>                         | <i>Acquired Immuno-deficiency Syndrome</i>  |
| <i>BBC</i>                          | <i>British Broadcasting Corporation</i>   |
| <i>Beijing Rules</i>                | <i>United Nations Standard Minimum Rules for the Administration of Juvenile Justice</i>     |
| <i>CEDAW</i>                        | <i>Convention on the Elimination of All Forms of Discrimination against Women</i>           |
| <i>CERD</i>                         | <i>International Convention on the Elimination of All Forms of Racial Discrimination</i>    |
| <i>CFS</i>                          | <i>Consumer Finance Survey</i>  |
| <i>CID</i>                          | <i>Criminal Investigations Department</i>   |
| <i>Commission on Discrimination</i> | <i>Commission on the Elimination of Discrimination and Monitoring of Fundamental Rights</i> |
| <i>CRC</i>                          | <i>Convention on the Rights of the Child</i>  |
| <i>CRM</i>                          | <i>Civil Rights Movement</i>  |
| <i>CYPO</i>                         | <i>Children and Young Persons Ordinance</i>   |
| <i>EHED</i>                         | <i>Eastern Human and Economic Development</i>   |
| <i>EPZ</i>                          | <i>Export Processing Zone</i>   |
| <i>FTZ</i>                          | <i>Free Trade Zone</i>  |
| <i>GCE</i>                          | <i>General Certificate of Education</i>   |
| <i>GCEC</i>                         | <i>Greater Colombo Economic Commission</i>  |
| <i>GDP</i>                          | <i>Gross Domestic Product</i>   |
| <i>GNP</i>                          | <i>Gross National Product</i>   |
| <i>HIV</i>                          | <i>Human Immuno-deficiency Virus</i>  |
| <i>HRTF</i>                         | <i>Human Rights Task Force</i>  |
| <i>ICCPR</i>                        | <i>International Covenant on Civil and Political Rights</i>                                 |

|                           |   |
|---------------------------|---|
| <b>ICESCR</b>             | <i>International Covenant on Economic, Social and Cultural Rights</i>                           |
| <b>ICRC</b>               | <i>International Committee of the Red Cross</i>   |
| <b>IDA</b>                | <i>International Development Agency</i>   |
| <b>IGP</b>                | <i>Inspector General of Police</i>  |
| <b>ILO</b>                | <i>International Labour Organization</i>  |
| <b>ITN</b>                | <i>Independent Television Network</i>   |
| <b>JVP</b>                | <i>Janatha Vimukthi Peramuna (People's Liberation Front)</i>                                    |
| <b>LFSES</b>              | <i>Labour Force and Socio-Economic Survey</i>   |
| <b>LMIS</b>               | <i>Labour Market Information Service</i>  |
| <b>LTTE</b>               | <i>Liberation Tigers of Tamil Eelam</i>   |
| <b>MOH</b>                | <i>Ministry of Health</i>   |
| <b>MSF</b>                | <i>Medicins Sans Frontieres (Doctors Without Borders)</i>                                       |
| <b>NGO</b>                | <i>Non-governmental organisation</i>  |
| <b>NHDA</b>               | <i>National Housing Development Authority</i>   |
| <b>O/L</b>                | <i>Ordinary Level (of the General Certificate of Education Examination)</i>                     |
| <b>ORC</b>                | <i>Open Relief Centre</i>   |
| <b>PA</b>                 | <i>People's Alliance</i>  |
| <b>PEG</b>                | <i>Productive Enterprises Grant</i>   |
| <b>PTA</b>                | <i>Prevention of Terrorism Act</i>  |
| <b>QUIPS</b>              | <i>Quick Impact Projects</i>  |
| <b>SIA</b>                | <i>Settling in Allowance</i>  |
| <b>SLAS</b>               | <i>Sri Lanka Administrative Service</i>   |
| <b>SLBC</b>               | <i>Sri Lanka Broadcasting Corporation</i>   |
| <b>SLFP</b>               | <i>Sri Lanka Freedom Party</i>  |
| <b>SLRC</b>               | <i>Sri Lanka Rupavahini Corporation</i>   |
| <b>TEWA</b>               | <i>Termination of Employment of Workmen Act</i>   |
| <b>Torture Convention</b> | <i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> |
| <b>TULF</b>               | <i>Tamil United Liberation Front</i>  |
| <b>UDHR</b>               | <i>Universal Declaration of Human Rights</i>  |
| <b>UNGA</b>               | <i>United Nations General Assembly</i>  |
| <b>UNHCR</b>              | <i>United Nations High Commissioner for Refugees</i>  |

**UNHRC**  
**UNICEF**

*United Nations Human Rights Commission*  
*United Nations International Children's  
Education Fund*

**UNP**  
**UNESCO**

*United National Party*  
*United Nations Education, Social and Cultural  
Organization*

**USCR**  
**WHO**

*United States Committee for Refugees*  
*World Health Organization*



# Foreword

This report seeks to describe the current status of human rights in Sri Lanka and to assess the extent to which Sri Lanka has fulfilled its duty to protect the fundamental rights of its citizenry in conformity with international obligations. Hence, the report represents an important watershed with regard to human rights in Sri Lanka. Constitutional guarantees, legislative enactments, and the extent of the current implementation and enforcement of fundamental rights are examined and the impact of the restrictions they contain are discussed. The report considers civil and political rights focussing on the integrity of the person, freedom of expression, judicial protection of human rights and the exercise of political rights, as well as economic, social and cultural rights focussing on the right to health, education and employment. In addition, separate chapters are devoted to the status of women, children's rights, group rights, the plight of displaced persons and the humanitarian law implications of the civil war.

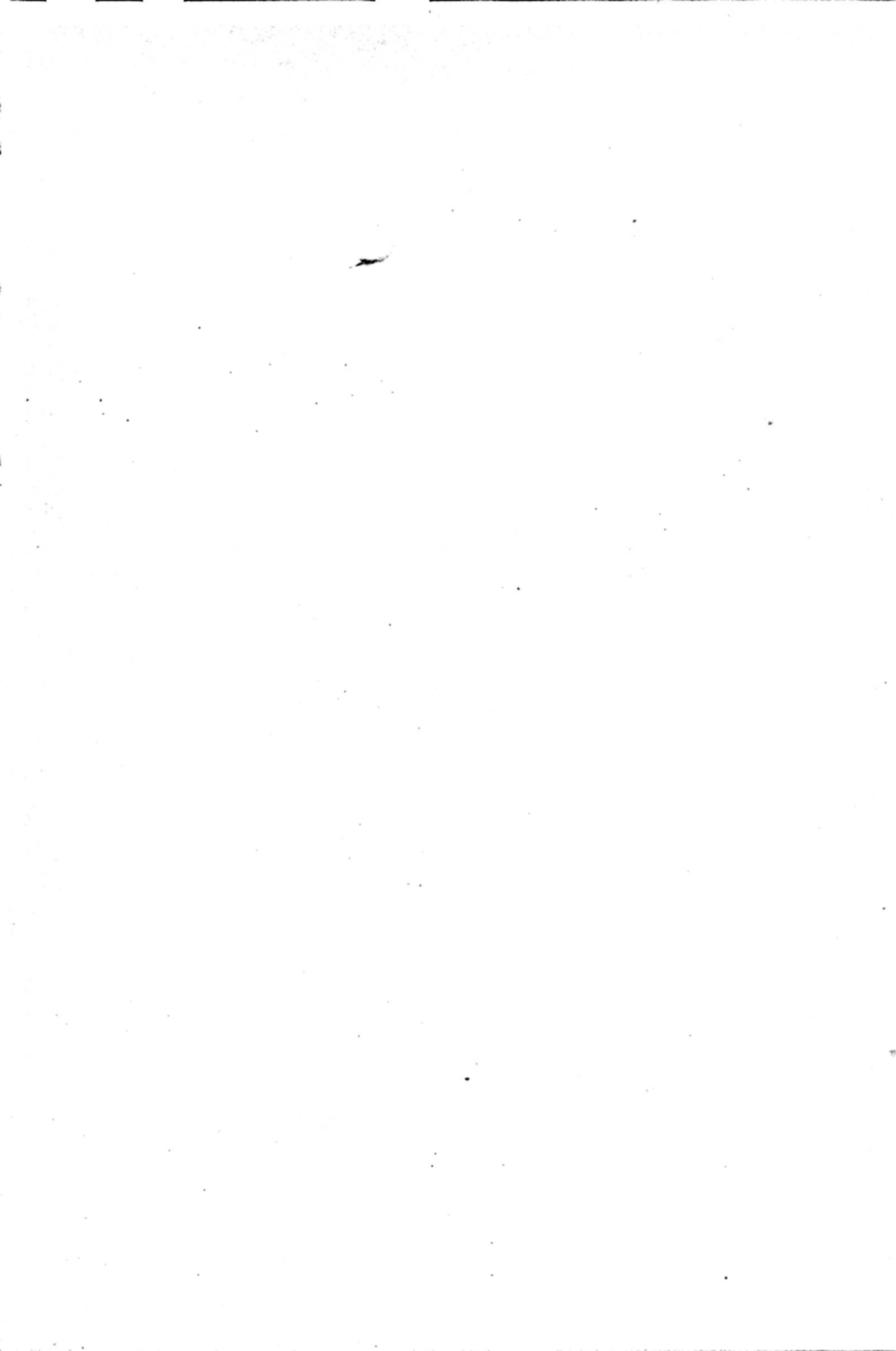
The report was co-ordinated by the Law & Society Trust. Specific chapters were assigned to individuals with special competence in the relevant areas. The drafts were subsequently reviewed for accuracy, objectivity and clarity of presentation. The report was then compiled in draft form and comprehensively edited to ensure that as far as practicable there would be uniformity of style and approach. It is inevitable, however, that there would be some overlap between chapters, and that some topics would be dealt with more comprehensively than

others. The report also contains a bibliography of important publications and reports on human rights and a list of international instruments to which Sri Lanka is a signatory. In addition, it gives a list of human rights instruments not ratified by Sri Lanka. It is encouraging to note that the Sri Lankan government has ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment since the publication of *Sri Lanka: State of Human Rights 1993*.

It is hoped that this report would continue to facilitate dialogue between civil society institutions and the government in ensuring more effective protection and promotion of human rights within Sri Lanka.

Sri Lanka's Constitution mandates that "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government..." Sri Lanka is also a signatory to several international human rights instruments, and must ensure that its domestic laws, policies and practices are in conformity with its international obligations. This report is a modest step in the continuing struggle to ensure that the state (and those non-state actors who are legitimately subject to scrutiny in this report) upholds its international and constitutional obligations to respect and safeguard human rights.

Law & Society Trust  
31 May 1995





# I

## Overview

### 1. Introduction

Nineteen ninety four was marked by elections and political change in Sri Lanka. For the first time in 17 years there was a change of government; the newly-formed People's Alliance (PA), led by the Sri Lanka Freedom Party (SLFP), replaced the United National Party (UNP) as the party in power. Human rights came to the forefront of the political agenda during election campaigning,<sup>1</sup> and hopes for substantial legislative and institutional reforms were raised by the narrow victory of the PA in the parliamentary elections in August 1994, followed by Chandrika Bandaranaike Kumaratunga's overwhelming victory in the presidential election in November 1994.

---

<sup>1</sup> Despite this, when the Civil Rights Movement of Sri Lanka (CRM) requested all parties contesting the parliamentary election to state their position on twelve specific human rights questions, neither of the two main parties - the UNP and the PA responded. CRM received responses from only the Nava Sama Samaja Party, the Liberal Party, the Lanka Sama Samaja Party, the Communist Party and the Tamil United Liberation Front (TULF). See CRM, "Political Parties Respond on Civil Liberties - No. 3," E 2/ 8/94 (8 August 1994).

## 2 *Sri Lanka: State of Human Rights 1994*

Many of the human rights issues of concern in Sri Lanka remain the same as in previous years. With the political changes, however, some issues gained new prominence and became the focus of intense debate during 1994. These included the problem of impunity for past human rights violations and the need for justice; the full, independent investigation of past human rights violations; and the extent to which the right to freedom of expression is realised in Sri Lanka.

The elections themselves raised several important issues relating to the right to political participation, which are discussed in Chapter II of this volume. These included the extent of election-related violence and the misuse of state resources, including the state-controlled media, for political purposes. They also included crucial questions about the extent to which the hundreds of thousands of people displaced by the civil conflict were ensured their right to vote, and the very possibility of conducting fair elections in those areas under the control of the Liberation Tigers of Tamil Eelam (LTTE).

The assassination by a suicide bomber of the UNP presidential candidate Gamini Dissanayake and over 50 other people, including other UNP leaders, at an election rally just two weeks before the presidential election was a potent reminder of the extent to which political freedom - and life itself - remained threatened by non-state forces. The LTTE - the main suspect in this attack - remained in control of areas of the North East throughout 1994 and continued to deny many basic freedoms to those living under their control. As Law & Society Trust's reviews of the state of human



rights in Sri Lanka in 1993<sup>2</sup> and 1994 demonstrate, there is a need for substantial action by government across the whole broad range of human rights protection. Civil and political rights are inadequately protected both in law and in practice, and the government needs to develop policies which target more precisely those groups of people who are most vulnerable in terms of poverty, nutritional status, health, education, gender and age. The consequences of well over a decade of armed conflict in the North East need to be fully addressed. The protection of civil and political rights in areas of conflict, and in other areas governed under a state of emergency, needs to be strengthened, at least by bringing it into line with international human rights standards. The economic and social rights of the residents of these areas - including the hundreds of thousands of internally displaced, as well as of refugees returning from overseas - need to be secured more fully, as discussed in Chapters XI, XII, XIII and XIV.

The new government thus faces many important challenges if it is to improve Sri Lanka's human rights status significantly, and put in place secure protections against future abuse. It is to be hoped that this volume - which reviews the status of a broad range of human rights in Sri Lanka during 1994 - will assist towards that end.

---

<sup>2</sup> *Sri Lanka: State of Human Rights 1993* (Law & Society Trust, Colombo, 1994)

## **2. The Promise of Reform**

The UNP government took one notable step towards greater human rights protection in early 1994 when it ratified the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter, the Torture Convention) in January 1994. However, it was not until the new government took office that legislation was passed, in November 1994, to give effect to the Convention in Sri Lankan law. Even then, the legislation that was enacted fell short of the full set of obligations that Sri Lanka undertook when it became a party to the Convention. This is discussed more fully in Chapter IV. Sri Lanka also ratified the Hague Convention relating to the inter-country adoption of children in 1994.

Announcements made by the Foreign Ministry shortly after the change of government indicated that human rights was being given considerable attention in policy. The Ministry appointed an Advisory Committee on Human Rights consisting of several leading, and independent, human rights specialists. The Foreign Ministry also announced that the government would shortly establish a permanent human rights commission which would be empowered to investigate complaints regarding infringements of fundamental rights. However, no draft legislation to establish the commission had been published by the end of the year. In response to this proposal, some human rights activists expressed concern about the proliferation of institutions dealing with human rights and stressed that priority should be given to strengthening basic safeguards against violations.

The need for two further important international instruments to be ratified had not been addressed by the end of the year. The Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) provides a right to individuals to petition the Human Rights Committee (the body set up to monitor compliance with the ICCPR) after all local remedies have been exhausted. It has yet to be ratified by Sri Lanka. The Additional Protocol II to the Geneva Conventions of 12 August 1949<sup>3</sup> elaborates the basic provisions already provided under Common Article 3 of the Geneva Conventions for the protection of victims of internal armed conflict, and if ratified it would automatically be binding on all parties to the conflict. It contains important provisions for the protection of the civilian population.

After coming to power in August 1994, the PA government acted promptly to initiate certain elements of its promised reforms. A Parliamentary Select Committee on Constitutional Reform was established and given until July 1995 to complete the work of reviewing proposals for, and recommending revisions to the Constitution. Issues of particular concern included the powerful executive presidency, which the PA had promised to abolish; the strengthening of fundamental rights protection; the electoral system; and the institution of judicial review. In November 1994, the proposals for reform of the fundamental rights chapter submitted to the Committee by the Minister of Justice, G.L. Peiris, were published.<sup>4</sup> These proposed reforms significantly enhanced human rights protection. However, the First Working Draft

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<sup>3</sup> The full title is: Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

<sup>4</sup> *Daily News*, 28 November 1994

of the Constitution published by the government in early 1995 was extremely disappointing in this regard; the majority of the improvements proposed earlier were not included. However, the government agreed to be responsive to proposals to improve the draft.

The PA government also moved quickly to begin talks with the LTTE as part of its election pledge to seek a political solution to the ethnic conflict based upon a scheme of substantial devolution of powers. Some of the "confidence-building" measures incorporated into this process included the release of a number of prisoners and the lifting of the embargo on 28 of the 42 items which had hitherto been barred from the North. A "cessation of hostilities" was agreed upon by the two sides in January 1995. The opening of negotiations, as well as the process of constitutional reform, brought to the fore issues of minority rights in Sri Lanka, which are discussed in Chapter XII. This chapter examines developments relating to the rights of minorities during 1994 including new policy direction and institutional developments. The chapter particularly examines the difficulties faced by minorities in exercising their right to use their own language, and in their ability to access education, health and employment without discrimination. The stated policy of the PA government indicated a shift favourable to the realisation of minority rights, and it is urged that the government undertake effective measures to ensure that minorities can live with dignity as equal citizens of Sri Lanka.

Certain issues relating to civil and political rights received renewed focus and public debate with the change of government. These were the linked issues of impunity and the need to fully investigate past abuses - which the UNP government

had failed to address adequately despite its repeated undertakings to the United Nations Human Rights Commission (UNHRC). In its election manifesto, the PA had promised that it would investigate "murders, disappearances, unresolved crimes and political victimisation which occurred in the recent past" and that "within three months of coming into power we will take immediate steps to provide to families information about the disappeared." After a series of delays, three presidential commissions of inquiry into disappearances were established in November 1994, each covering a specified area of the country. The government's policy on whether these investigations were intended to result in prosecutions of security personnel implicated in disappearances was not made clear. This is discussed more fully in Chapters VI and VII. A further Special Presidential Commission of Inquiry was established in November to investigate the assassinations of certain prominent political leaders and others.

The excavation of a mass grave at Suriyakande, which was believed to contain the remains of dozens of people who had disappeared during the UNP government's counter-insurgency campaign against the *Janatha Vimukthi Peramuna* (JVP) (People's Liberation Front) between 1988 and 1990, had begun in a rather haphazard manner in January 1994, while the UNP was still in power, but on the initiative of opposition SLFP politicians. The excavation became a public and politically charged event. The persons responsible for uncovering the graves were threatened, and a lawyer who had reported the graves to the magistrate was shot at while returning home. Little progress was made in this investigation under the UNP. After the elections, however, different members of the government made inconsistent

statements on the government's position regarding the excavation and investigation of mass graves of this type, and whether those responsible for disappearances would be brought to justice.<sup>5</sup> This is discussed more fully in Chapter VI.

Freedom of expression - and particularly freedom of the media - also emerged as a major human rights issue in 1994. In its election manifesto, the PA had promised to remove constraints on freedom of the media and after it came to power, journalists spoke of a new sense of freedom. However, after the assassination of Gamini Dissanayake prior to the presidential election, the PA government itself began to censor the press and the government-controlled media displayed evident bias, as described in Chapter VIII. The urgent need for substantial institutional and legal reforms in this area became even more apparent. Freedom of artistic expression is examined in Chapter IX, which covers the PA government's cultural policy, and the censorship of literature, painting, plays, films and foreign publications.

Several pieces of legislation were introduced during 1994 which have a bearing on human rights protection, in addition to the anti-torture legislation referred to above. An amendment was passed in December to the Ombudsman Act which simplifies the procedure for registering complaints with the office of the Ombudsman. The Ombudsman's office has long been criticised as unduly burdensome and procedurally inaccessible, which limited the number of complaints filed. Previously, the Act required all allegations of violations of

---

<sup>5</sup> Further commissions of inquiry were also created to investigate the assassinations of various prominent persons.



fundamental rights or other injustices perpetrated by state or public actors to be registered initially with the Public Petitions Committee of Parliament. The procedure now allows complaints to be made directly to the Ombudsman, bypassing entirely the parliamentary committee stage. The amendment also imposes a duty on the Ombudsman to inform the complainant directly if a decision is made not to continue the investigation, instead of informing the Public Petitions Committee. Upon determining whether there has been or is likely to be an infringement, the Ombudsman is now required to report such determination both to the head of the institution concerned and the minister to whom the department is assigned. The attempt to simplify the Ombudsman procedure is a welcome development, particularly because the amendments are aimed at making the procedure more accessible for use.<sup>6</sup>

Two other pieces of legislation passed in 1994 have important human rights dimensions. First, the Registration of Deaths (Temporary Provisions) Act, passed on 25 November 1994, allows the next of kin of a person who is reported missing and presumed dead to apply to register such person's death after a minimum period of one year, and clearly sets out the procedures which must be followed by the District Registrar upon receiving a request for a death registration. The form for registering the death of disappeared persons, which is attached to the text of the Act, is simple and uncomplicated. The importance of creating a workable system by which family members of disappeared persons can register the death of such persons cannot be emphasised sufficiently. Second,

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<sup>6</sup> Hopefully, the simplification of procedure will give rise to an increase in the use of the Ombudsman for violations of fundamental rights. The office has historically received very few of these.

the Bribery (Amendment) Act, which was passed in September, was intended to establish more efficient and effective means for holding public officials accountable for bribery and corruption. The amendment expanded the definition of "bribery" and the definition of "public servant," thereby creating a broader base upon which to rest allegations of bribery. However, human rights activists expressed concern about certain aspects of the Act, including the fact that it has retroactive effect and that it removes the supervisory control of the courts over the actions of the Bribery Commission.

Emergency regulations were in effect throughout the year, except for a period of one month from July to August. At different times, changes were made both to the areas within which they applied and to their content. These changes included the welcome removal of certain regulations which had no relationship to national security or public order, such as those pertaining to edible salt or provincial school boards. However, they did not address certain crucial issues of long-standing concern, continuing, for example, to provide for indefinite administrative detention and failing to provide adequate safeguards against arbitrary detention and torture. The emergency regulations are discussed more fully in Chapter III.

One major consequence of the changes in emergency regulations which needs to be highlighted, however, is that the Human Rights Task Force (HRTF)<sup>7</sup> was deprived of

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<sup>7</sup> The HRTF was a body created by the previous government to monitor the fundamental rights of detainees. It was established and given certain powers under emergency regulations made under the enabling provisions of Section 19 of the Sri Lanka Foundation Law No. 31 of 1973. These regulations were promulgated in Gazette No. 673/2 of 31 July 1991 and Gazette No. 674/17 of 10 August 1991. They lapsed in July 1994.

its powers; indeed, its very status since July 1994 remains uncertain. The HRTF had been charged with the important task of registering and monitoring the welfare of detainees, and had been empowered to enter places of detention and conduct investigations into alleged violations of their rights. No other institution has been created to replace the HRTF. This change, therefore, must be seen as a significant weakening of the human rights protection provided to detainees. The strengthening of certain arrest and detention procedures under the emergency regulations do not compensate for this loss; the procedures continue to provide inadequate protection, and anyway may well not be adequately implemented in the absence of an independent monitor, such as a properly empowered HRTF.

Reports of certain gross human rights violations, such as disappearances and unlawful killings, which had been committed in very large numbers in recent years, were committed with less frequency during 1994. The fact remains, however, that proper legal and procedural safeguards against their commission have yet to be put in place. This remains a matter of considerable concern, especially given that tens of thousands of people are estimated to have disappeared and been unlawfully killed in Sri Lanka in the past decade. The issue of impunity, and the need for justice to be done, mentioned above, also have clear implications for the prevention of such violations.

Other outstanding serious human rights concerns, which have been documented by human rights organisations year after year, include torture, arbitrary arrest and detention, and the right to a fair trial. These are discussed in Chapter IV.

### **3. Further Human Rights Issues Addressed in this Volume**

Chapter XI of this volume provides a broad discussion of socio-economic rights in Sri Lanka, concentrating on health, education, employment, housing and access to water and sanitation. The chapter attempts to disaggregate national level data on these subjects on a regional, sectoral and gender basis in order to provide a profile of the differences in the attainment of socio-economic rights by different groups of people.

While many of the chapters in this volume are thematic, some are concerned with the broad range of rights pertaining to specific groups of people: the rights of workers, of minorities, of the displaced and returned asylum-seekers, of children, and of women. The chapter on workers' rights (Chapter X) concentrates on specific issues that were of importance in 1994, and also provides a review of the relevant legislation in force. The chapter on children's rights (Chapter XV) concentrates on specific categories of children: those in breach of criminal law; those who are abused and sexually exploited; and those who are employed. It seeks to assess whether Sri Lankan law relating to children conforms to international human rights standards, and to highlight the strengths and deficiencies of Sri Lankan law in relation to these groups of children. In Chapter XVI on women's rights, particular attention is paid to the extent to which the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been translated into law and practice in Sri Lanka. It examines women's participation in public life, the economic and social rights of women and violence against women.

There is often a close nexus between the violation of civil and political rights, discussed in the first section of this volume, and social and economic rights. Those who are socially, economically and politically most vulnerable or marginalised are frequently victims of the worst violations of their civil rights. The interconnections of regional disparities and disadvantage along lines of ethnicity, gender and age are complex, as discussed in Chapter XI on socio-economic rights. Heightened awareness of these issues, however, may assist in ensuring that the development effort itself, in the broadest sense, does not exacerbate conflict, and that it may contribute positively to the greater realisation of the whole broad range of human rights for all Sri Lankans.

## **II**

# **Respect for Political Rights in Sri Lanka**

This chapter discusses respect for political rights in Sri Lanka by examining the system of governance, the legal framework, the electoral system and the actual practice of the parliamentary and presidential elections held in 1994.

### **1. System of Governance: From Parliamentary Democracy to Executive Presidency**

Sri Lanka gained independence from the British in 1948. Universal adult franchise was granted by the colonial government to the people of the island in 1931. The system of government of the then Ceylon immediately after independence in 1948 - established under the Ceylon (Constitution) Order in Council, 1946 - was committed to parliamentary democracy where periodic elections were to play a central role in reinforcing the newly won right of self government. The right to participate in the governing process mainly through free and fair elections was such an entrenched feature of the political order that it would not be an exaggeration to state that the populace took it for granted.



## **1.1 The Loss of Political Innocence**

Beginning in the 1970s, however, the hitherto unblemished electoral process was seriously threatened by unwarranted tinkering by the incumbent governments. For example, elections were postponed, and one general election was replaced with a referendum. This situation was exacerbated after 1977 by widespread rigging of elections by the governing UNP accompanied by unprecedented pre- and post-election violence. This period witnessed the institutionalisation of state violence and the escalation of the conflict between the state and the minority Tamils. Not surprisingly, confidence in the electoral process eroded seriously.

## **1.2 Devaluation of Democracy: The Executive Presidency**

The establishment of the executive presidency under the 1978 Constitution of Sri Lanka, which concentrated great powers in the executive president, also contributed in great measure to the decline of participatory democracy in the country. Under that constitutional scheme, the all-powerful president was granted immunity from suit while holding office with regard to anything done *either in an official or personal capacity* (Article 35(1)). Parliament was devalued to a mere rubber stamp. Indeed, the architect of the executive presidency, the then President J.R. Jayewardene, had obtained undated letters of resignation from the members of parliament belonging to his party, the UNP.

The frequent declarations of states of emergency under the Public Security Ordinance greatly expanded the already monolithic powers of the executive president. Gradually,



rule by the executive under emergency powers came to be the norm rather than the exception, with the president "legislating" on matters ranging from national security to the quality control of salt.<sup>1</sup>

### 1.3 Lack of Accountability and Transparency

This scheme of governance paved the way for authoritarianism. The Constitution itself provided very little guarantee of accountability and transparency in government.

As pointed out above, the president is completely immune from suit. Judicial review of legislation is not permitted. The constitutionality of a Bill may be questioned only by invoking the constitutional jurisdiction of the Supreme Court *within a week* of it being placed on the Order Paper of Parliament (Articles 120 and 121). There is a general tendency of self-censorship when it comes to commenting on the judiciary for fear of being cited for contempt of court, primarily because the parameters of the contempt doctrine are not clear.

The right to petition the Supreme Court alleging an infringement or an imminent infringement of a fundamental right or rights guaranteed by the Constitution by administrative or executive act is perhaps the only significant constitutional relief granted to the people to protect them from the caprice of the state (Article 126).

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<sup>1</sup> See *Review of Emergency Regulations*, The Centre for the Study of Human Rights, University of Colombo, Sri Lanka in association with the Nadesan Centre (1993)

## 1.4 A Culture of Fear

Remnants of the democratic political culture in the country were dealt heavy blows by the "fear psychosis" instilled by rampant violence perpetrated by both the state (through state agencies as well as para-military and goon squads) and anti-state entities. Chief perpetrators among the latter grouping were the LTTE and the ultra-nationalist Sinhala group, the JVP.<sup>2</sup> The ascendance of armed non-state actors has, for the most part, been attributed to the anti-democratic nature of the state.

The cloud of fear dissipated to some extent after the assumption of the presidency by the then Prime Minister D.B. Wijetunga following the assassination of President R. Premadasa on 1 May 1993. The dramatic turn of events towards the latter part of that year, when a provincial councillor was abducted, allegedly by the UNP, galvanised renewed demands for political freedom and clean government. This marked the reactivation of the dormant political will of a society which had maintained a fearful silence for nearly two decades.

The political opposition, too, reorganised itself into a coalition, the PA, under the leadership of Chandrika Bandaranaike Kumaratunga. The coalition made the universal demands for a society free of fear and corruption, and for transparency in governance, its central political theme. Against this background, President Wijetunga dissolved parliament on 25 June 1994 and scheduled an early general parliamentary

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<sup>2</sup> See Amnesty International, *Sri Lanka: Extrajudicial Executions, 'Disappearances' and Torture, 1987 to 1990* and *Sri Lanka: A Human Rights Crisis* (London, 1990)

election on 16 August 1994, six months before it was due. This election proved to be a crucial test for democracy in Sri Lanka.<sup>3</sup>

## 2.    The Legal Framework

Article 1 of the 1978 Constitution describes Sri Lanka as a "... Free, Sovereign, Independent and Democratic Socialist Republic ..."

The Directive Principles of State Policy declare in Article 27(4) that:

*The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government.*

Under the 1978 Constitution of Sri Lanka, voting at presidential and parliamentary elections and at referenda shall be "free, equal and by secret ballot" (Article 93). Every citizen above the age of 18 years possesses the franchise unless

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<sup>3</sup> In 1994, certain other elections were also held at the local level. The Southern Provincial Council elections, held on 24 March, yielded a decisive victory to the PA led by Chandrika Bandaranaike Kumaratunga, still then in opposition. Local elections held in the East and in Vavuniya district in March were noteworthy, as they were the first elections to be held there for 11 years. The UNP claimed overall victory in those areas, but voting fell significantly along ethnic lines. There were serious allegations of police misconduct, voter intimidation and poll malpractice in many districts (see INFORM, *Situation Report - March 1994*, Colombo).

disqualified on the grounds specified by the Constitution, which are insanity and conviction of an offence (Article 89).

In 1980 Sri Lanka ratified the ICCPR, under which the government is bound to ensure the right of citizens to take part in the conduct of public affairs, directly or through freely chosen representatives (Article 25(a)). Similarly, the government undertook, under Article 25(b) of the ICCPR, to ensure the rights of citizens to:

*vote and be selected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.*

The Constitution itself provides for the conducting of presidential and parliamentary elections as well as referenda. Further legislation provides for election of provincial councils and local government bodies.<sup>4</sup> The Constitution also provides for the appointment of the Commissioner of Elections, who holds office during good behaviour (Article 103) with powers to conduct elections.

It also recognises, in Article 14(1)(a), (b) and (c) freedom of expression, of association and peaceful assembly - rights indispensable to the securing of political freedom - as justiciable fundamental rights. Further, Article 12 (2) prohibits discrimination against citizens, *inter alia*, on the ground of political opinion.

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<sup>4</sup> Under the Provincial Councils Elections Act No. 2 of 1988 and Local Authorities Elections Ordinance No. 53 of 1946 (as amended) respectively

### **3.    The Electoral System**

#### **3.1   Election of Members of Parliament**

The life term of parliament is six years. This does not preclude the power to hold early elections (Article 62). The conduct of parliamentary elections is provided for by the Parliamentary Elections Act No. 1 of 1981 (as amended).

Under the 1978 Constitution, parliament consists of 225 members, of whom 196 are elected from the country's 22 electoral districts on the basis of proportional representation (PR). Voters first vote for a party or independent group of their choice and then mark their preferences for three candidates from among a list of candidates nominated by that party or group for that electoral district (Article 99(2)). Parties or independent groups are then entitled to representation proportionate to the number of votes they have polled in that district. Those candidates who have received the highest number of preferential votes from parties or groups eligible for representation in parliament will fill the seats each party or group is entitled to (Article 99(8)). Under this scheme, any party which obtains less than 5% of the total votes in an electoral district is disqualified from having a candidate from that party elected for that district (Article 99(6)(b)). The remaining 29 members are nominated to parliament from the national lists of contesting political parties on the basis of the island-wide percentage of votes each party obtains (Article 99A).

Under the pre-1978 electoral system, members of parliament were elected on the basis of the "first-past-the-post" system (or simple majority system). That is, the candidate who

got the majority of votes in an electorate was declared elected. This system, which was in place from independence, resulted in great anomalies which raised serious questions about the fair political representation of the people. For example, at the 1970 general election the SLFP obtained 36.9% of the total votes and returned 91 candidates (with one candidate returned uncontested) whereas the UNP, which obtained more votes with 37.9% of votes, returned only 17 candidates!<sup>5</sup> At the 1977 general election, the SLFP had only eight candidates returned with 29.7% of the votes while the UNP had 140 candidates returned with only 50.9% of the votes. The TULF, which polled only 6.4% of the votes, obtained 18 seats and qualified to lead the opposition in parliament.<sup>6</sup> It has been pointed out that if those results were projected under the PR system currently in operation, the UNP would have obtained only 84 seats, the SLFP 51 seats and the TULF 14 seats.<sup>7</sup>

The system of PR adopted on the initiative of the UNP government in 1978 did have the effect of obviating such serious anomalies. At the 1989 general election held under the new PR scheme, the UNP obtained 50.71% of the total votes and returned 125 candidates (55.5% of total seats), while the SLFP returned 67 candidates (29.7% of the seats), having obtained 31.9% of the total votes. This result reflected a more equitable representation, consonant with the aspirations of the electorate.

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<sup>5</sup> Statistics provided in *The Parliament of Sri Lanka - Presidential Election 1982, Referendum 1982, General Election 1977, Elections 1977 to 1986* (The Associated Newspapers of Ceylon Ltd., Lake House, Colombo) p 354

<sup>6</sup> *Ibid*, p 355

<sup>7</sup> *Ninth Parliament of Sri Lanka: Presidential Election 1988, General Election 1989* (The Associated Newspapers of Ceylon Ltd., Lake House, Colombo) p 51



The PR system has another salutary effect. It prevents any single party from obtaining the potentially tyrannical majorities that resulted from the 1970 (nearly 2/3 majority) and 1977 (5/6 majority) general elections.

It must also be pointed out that under the scheme contemplated by the 1978 Constitution, the number of seats allotted to each electoral district (from among a total number of seats frozen at 196) is determined primarily in proportion to the number of registered voters in each district (Articles 96, 97 and 98). This reduces the possibility of gerrymandering by delimitation commissions, which had become an issue of concern under the previous system. However, a weakness inherent in this system of allocating seats is that sparsely populated, underdeveloped areas may not have a strong representation in parliament, unlike the relatively developed and densely populated urban areas, thereby undermining the political strength of the rural population.

One of the major criticisms levelled against the PR system is that since voters vote primarily for a party, they do not have a direct say over which individual members will represent them, and that therefore representatives have a more remote relationship with their constituents. Under the "first-past-the-post" system voters had a direct say over which individual candidate was to represent them. Another criticism concerns the cut-off point of 5% under Article 99(6)(a). This alienates smaller parties from the electoral process, thereby denying representation to non-mainstream constituencies, which could have a detrimental impact on minority representation.

The thrust of election campaigns has also seen a dramatic change resulting from the preferential vote system. There

is now heightened intra-party fighting between candidates of one party or group for preferential votes, rather than concentrating on the customary inter-party contests based on political issues.

Another concern is that the complex system of voting has seen an increase in the number of spoiled votes which could very well have an impact on the final result. At the 1989 general election, for example, 6.1% of total votes was rejected.<sup>8</sup> At the 1994 general elections 4.8% of total votes was rejected, in spite of a greater degree of familiarity with the voting system.<sup>9</sup>

### **3.2 Election of the Executive President**

The president, according to the 1978 Constitution which introduced the office, is to be elected by the people for a period of six years (Article 30(2)). The candidate who receives more than one-half of the valid votes cast shall be declared elected as president (Article 94(2)). The Presidential Elections Act No. 15 of 1981 (as amended) provides for the conducting of a presidential election.

### **3.3 Political Pluralism**

In spite of the oppressive political climate prevalent in the country since the 1970s, Sri Lanka can boast of an array

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<sup>8</sup> *Ibid*, p 131

<sup>9</sup> Movement for Free and Fair Elections, *Interim Report on the Sri Lanka Parliamentary Elections of 16 August 1994* (hereinafter MFFE Report) Annex I



of political parties representing various shades of the political spectrum.<sup>10</sup> The main contenders to political power are the right-wing UNP and the left-of-centre SLFP. Historically, governments have alternated between these two parties.

There are also a number of small left-wing political parties such as the Communist Party (CP) and the Lanka Sama Samaja Party (LSSP). These parties have played a significant political role, in spite of their small membership, both at independence and subsequently through coalition government with the SLFP.

There are also a number of parties based on ethnicity. This has been a feature of the political scene in Sri Lanka since independence. There are parties representing the interests of Tamils, such as the TULF, and of Muslims, such as the Sri Lanka Muslim Congress (SLMC). The Ceylon Workers' Congress (CWC) is a trade union functioning as a political party representing a section of the Tamils in the estate sector.

Interestingly, some of the armed militant Tamil groups have now entered the democratic political process as recognised political parties. So also has the Sinhala-based militant group, the JVP, which contested the 1994 parliamentary election on the Sri Lanka Progressive Front (SLPF) ticket.

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<sup>10</sup> According to the Elections Commissioner's Office there were 31 registered political parties as of 3 July 1994.

#### 4. The Parliamentary Election of 1994

Thirteen political parties and 26 independent groups forwarded nomination papers to contest the general parliamentary election held on 16 August 1994.<sup>11</sup> Of a population of approximately 17.5 million, there were 10,945,065 registered voters in 22 electoral districts. Election day saw a voter turnout of 76.24% of registered voters.

The PA, which won 105 seats as opposed to 94 won by the UNP, formed a government with the SLMC (7 seats) and an independent candidate representing the Tamils of the estate sector. The PA victory marked an end to 17 years of rule by the UNP. Chandrika Bandaranaike Kumaratunga of the PA was appointed the Prime Minister.

Other parties which won seats were the TULF (5 seats); the pro-UNP Tamil para-military group, the Eelam People's Democratic Party (EPDP) (9 seats); the Democratic People's Liberation Front (DPLF) (3 seats), which was a grouping of three Tamil parties; and the pro-JVP, SLFP (1 seat).<sup>12</sup>

The election was marred by the anomalous situation arising from the election held in the LTTE-controlled Jaffna district and the Vanni district. Also, the inability of a majority of the nearly 600,000 internally displaced persons to cast their votes posed troubling questions about the representation of several electoral districts.<sup>13</sup>

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<sup>11</sup> See Section 1 above for background on the calling of this election.

<sup>12</sup> Statistics provided by Commissioner of Elections in *Parliamentary General Election of Sri Lanka 16th August 1994 - Report of the International Observer Group* (hereinafter International Observer Report) Annex V, pp 52-53

<sup>13</sup> See Sections 5 and 6 below

#### 4.1 Election Monitoring

The 1994 parliamentary election proved to be crucial to the reaffirmation of the democratic process. The public, subjected to repeated cycles of political violence for nearly two decades and incensed by continuing subversion of the democratic process and traditions, seemed to be determined to prevent rigging. The election was monitored on an unprecedented scale, and there were campaigns to raise consciousness about the adverse consequences of election violence. Non-governmental organisations (NGOs) played a key role in this process. A widespread tri-lingual advertisement campaign by the Inter-Religious Core Group discouraging election violence was tremendously successful in heightening awareness.

The Movement for Free and Fair Elections (MFFE) and the People's Action for Free and Fair Elections (PAFFREL) were coalitions of local NGOs which had come together for monitoring pre- and post-election violence. In addition, they invited an international NGO Election Observer Mission co-ordinated by the International Human Rights Law Group. The Mission consisted of 35 participants from 13 countries. Their terms of reference were to assist local NGO observers to determine to what extent the election was free and fair in accordance with laws of Sri Lanka and international laws and standards.<sup>14</sup>

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<sup>14</sup> International Human Rights Law Group, *Report of the International NGO Observer Mission to the Sri Lanka Parliamentary Elections* (September, 1994) (hereinafter International NGO Report) Appendix B

Interestingly, the Organisation of Professional Associations (OPA), an umbrella organisation bringing together professional associations, also joined the polls watch and worked in close collaboration with PAFFREL. In addition to monitoring violations of election laws, the OPA also undertook the task of creating "public awareness about the urgent need for free and fair election for the very survival of democracy."<sup>15</sup>

The Commissioner of Elections also invited an international observer group with the concurrence of both the ruling party and opposition parties. It comprised 44 observers from 12 countries, and included two observers from the International Commission of Jurists. Their terms of reference were to provide a broad assessment of whether the election was free and fair under the law of Sri Lanka.<sup>16</sup>

The international NGO observers covered 15 of the districts while the "official" international observers covered all 22 districts. The latter was the only group which observed elections in the controversial Jaffna district.

## **4.2 Election Related Violence**

### **4.2.1 Pre-election violence**

The run-up to the election was violent, with nearly 20 election-related murders, mostly of PA supporters. Election observers expressed grave concern at the involvement in

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<sup>15</sup> Organisation of Professional Associations, *OPA Elections Watch Report, General Elections August 1994* (15 September 1994)

<sup>16</sup> International Observer Report, p 9

this violence of local authorities. According to reports received by the observers, violence peaked on and after the deadline for nominations on July 11th.<sup>17</sup>

By the morning of election day, 16 August, more than 3,000 cases of election-related violence had been reported to the police. According to police statistics quoted by observers, 2,092 cases of intimidation, 725 cases of minor mischief, 39 cases of major mischief, 1,003 cases of simple assault, 47 cases of serious violence and 12 complaints of murder were reported to the Police Election Secretariat. The districts of Colombo, Matale, Kegalle, Ratnapura, Kandy, Kalutara, Digamadulla and Anuradhapura recorded a high number of violent incidents.<sup>18</sup>

Violence took various forms: mainly intimidation, beatings and destruction of property.<sup>19</sup> Observers claim that there were between 12-20 election-related deaths. Most of the victims reportedly were PA supporters. In one blatant incident a UNP Provincial Councillor from Kurunegala, R.M.T.B. Ratnayake, reportedly shot dead a villager for refusing to remove a PA poster beside his house on 4 August in Meegalaawa, Nikaweratiya. He was arrested by the police the following day. In perhaps the only case where a PA politician was implicated in an election-related killing, the Polonnaruwa district PA candidate T.B. Mahalekam was arrested by the police allegedly for stoning a bus which

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<sup>17</sup> International NGO Report, pp 13-28; MFFE Report, p 4

<sup>18</sup> Police Election Secretariat Statistics up to 16 August 6 a.m. reproduced in Annex III of MFFE Report

<sup>19</sup> International NGO Report, pp 22-28

was transporting UNP supporters which led to the death of two passengers.<sup>20</sup>

Grave concern was expressed over the involvement of candidates themselves in a considerable number of violent incidents. Police bias was also considered to have exacerbated pre-election violence.

A number of such incidents were reported from the Matale district. On 12 July, UNP candidate Alick Aluvihare had arrived with two police cars at the PA office in Dambulla and threatened supporters and members there. The police cars were from Galewela police station and the police officers were in uniform. On 5 August 1994, one Mr. Wickramasinghe, a UNP provincial council member from Galewela, and the police chief from Wahakotte, went to the PA party office at Kendangamuwa. They reportedly asked all PA supporters to leave the premises. Wickremasinghe and UNP supporters of Alick Aluvihare then set fire to the party office. A report was lodged at the Galewela police station and the police stated that the matter would be investigated. On 14 August in Hathamunagala, Matale, a van carrying local PA leader Nimal Jayawardane and PA organiser Gamini Ekanayake and several other PA supporters was attacked by a group of persons, later identified by the victims as the son of the UNP candidate and his supporters. The attackers used iron bars and knives. Ekanayake was hospitalised with a head injury and Jayawardane had knife

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<sup>20</sup> *Ibid*, pp 17-22; MFFE Report, pp 4-12. See also minority report by eight members of the International Observer Group annexed to the main report, which criticises the former for underestimating the impact and incidence of violence and other election related issues.



wounds on both thighs. The van itself had six windows broken, four deflated tyres and other damage.<sup>21</sup>

In another such typical incident which took place on 7 August, Lalith Silva, a UNP candidate, and his supporters gathered outside a house in Karawalabedde, Galle, where a PA meeting was in progress and threatened the meeting. Gunshots were heard coming from outside; at least one bullet shell was later found inside the house. PA supporters then retaliated.

In most reported instances those implicated were UNP candidates and supporters.<sup>22</sup> Other political parties certainly were not blameless. For example, on 11 August, PA supporters attacked a vehicle returning from a UNP rally at Mukulugasgamuwa in Matale. The vehicle was damaged and one person was injured and briefly hospitalised. UNP security men caught one of the assailants and turned him over to the Galewela police station. The suspect was produced before a magistrate and released on bail.

In Batticaloa, SLMC candidate Basheer Segu Dawood had reportedly openly threatened to "inject cyanide," "shave heads" and "kill people" who supported the UNP at a meeting in Eravur held on 13 August. According to observers' accounts, many took the threat seriously and some polling officers refused to take up their posts.<sup>23</sup>

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<sup>21</sup> International NGO Report, pp 23,28

<sup>22</sup> *Ibid*, p 28

<sup>23</sup> International NGO Report, pp 23-24; MFFE Report, p 11



#### **4.2.2 Election day**

Election day on 16 August was relatively peaceful given the widespread violence which preceded it. Observers reported one election day death and several violent incidents in the Matale and Puttalam districts, and sporadic incidents in other areas. On the whole there was general agreement that the police acted with relatively more impartiality on election day.<sup>24</sup>

One violent incident on election day which was widely condemned for its brutality occurred in the course of transporting ballot boxes. A security guard named Reggie of UNP candidate Joseph Michael Perera (Gampaha district) had reportedly thrown acid at the car of PA candidate Felix Perera on the evening of election day. Joseph Perera had seen an empty ballot box in the bus used to transport the boxes and had accused the PA candidate of trying to tamper with the vote. The extra ballot box was in fact being used by the polling officials to carry election day office supplies. Felix Perera's brother Conrad and four policeman standing nearby received acid burns on the face.<sup>25</sup>

Observers also reported some incidents where voters were intimidated on election day by candidates, party supporters and, in a few incidents, by the police. Although polling cards are not necessary for voting, in some instances they were used as a means of vote-rigging. Incidents where polling cards were not delivered to voters for inexplicable reasons,

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<sup>24</sup> International NGO Report, pp 38-44; MFFE Report, pp 20-23

<sup>25</sup> International NGO Report, p 37

of grabbing them from voters and of private individuals distributing them were recorded. Many voters who did not receive their polling cards refrained from voting under the mistaken notion that they were essential to vote.<sup>26</sup>

In order to prevent post-election violence President Wijetunga declared an island wide curfew at the close of polling. The victorious PA leadership, especially Chandrika Kumaratunga, had repeatedly emphasised during the election campaign the need to refrain from violence during and after the election.

### **4.3 Misuse of State Resources for Political Purposes**

#### **4.3.1 Personnel and other resources**

All observer groups were united in their condemnation of the misuse of state property during the election by the ruling UNP party. As the International Human Rights Law Group pointed out, among the candidates the UNP fielded there were no less than 91 who still held ministerial posts of some sort and continued to enjoy the attendant state privileges during the election campaign. The observers pointed to corroborated reports of the misuse of mainly state personnel and vehicles for election purposes.<sup>27</sup>

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<sup>26</sup> MFFE Report, p 19; International NGO Report, pp 34-35

<sup>27</sup> International NGO Report, pp 10-12; MFFE Report, pp 13-17; International Observer Report, p 34

As the MFFE Report put it:

*From state bank employees to police, from Mahaweli Authority vehicles to government milk lorries, electioneering was intentionally confused with state business.*<sup>28</sup>

#### **4.3.2 State-controlled media**

The incumbents' misuse of the state-run media, and especially electronic media, for campaign purposes came in for a great degree of criticism by voters and observers.<sup>29</sup> Although all contesting parties were given equal time to present their agenda to the public, there was considerable bias towards the ruling UNP evident in other programming in the state-run electronic media. In thinly veiled propaganda campaigns, the government's development policies and achievements were given an undue degree of emphasis in feature and news programmes. The private television and radio channels, which had been permitted to operate since 1993, did not carry news or current affairs programmes and, therefore, did not affect the campaign.<sup>30</sup>

The practice of using state-controlled media as the organ of the ruling party, which has been evident under every government but developed to a fine art under President Premadasa, has pointed to the need for strong legal safeguards to ensure equal access to the media by all contesting parties to ensure free and fair elections.

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<sup>28</sup> MFFE Report, p 13

<sup>29</sup> See Chapter VIII, Freedom of Expression and the Media

<sup>30</sup> MFFE Report, pp 17-18

#### **4.4 Manipulation of the Electoral Process**

There was no mass level of impersonations reported. Under election procedure in Sri Lanka, it is not required that an official form of identification be produced for permission to vote. This factor had, on previous occasions, affected election results in a considerable manner. Curiously, almost all political parties have opposed moves to introduce a requirement for production of identification papers at polling booths. The former Elections Commissioner, Chandrananda de Silva, has in no uncertain terms emphasised the need to introduce National Identity Cards into the voting process.<sup>31</sup>

Election observers reported a number of instances of impersonation and also instances of voters being left off the electoral roll in spite of long term residency. They have pointed out, however, that the incidence was not large enough to adversely affect the election result.<sup>32</sup>

No major incidents of irregularities pertaining to tampering of ballot papers and counting were reported, marking a sharp contrast to previous elections.

#### **5. Election in the LTTE-held Jaffna and Vanni Districts**

Much controversy surrounded the announcement by the government of President Wijetunga that the parliamentary election would be held in the Jaffna and Vanni electoral

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<sup>31</sup> *Report of the Commissioner of Elections on the Second Presidential Election of Sri Lanka held on 19.12.1988* (1992) pp 260-261

<sup>32</sup> International NGO Report, pp 34-35

districts, where the LTTE controls respectively approximately 80% and 50% of the territory.

As the LTTE was opposed to the poll, in reality the election could be held only in "cleared" areas under the control of the government. The LTTE does not permit political parties to operate in areas under its control. Most political parties, including the PA, did not have access to even the cleared areas in the Jaffna district which were, in any event, controlled by the pro-UNP armed group, the EPDP. This precluded all parties contesting in the district, other than the EPDP, from campaigning in the cleared areas. The PA did not contest in the district, leaving the SLMC to look after PA interests as well. The interests of the UNP were represented by the EPDP.

The electoral roll of the Jaffna district had not been updated since 1986. Further, a considerable number of residents of the district had become internally displaced persons living elsewhere in the island due to the protracted civil war.<sup>33</sup>

In view of this unacceptable situation, appeals were made to the Elections Commissioner not to hold the elections in the Jaffna district. An appeal by the CRM to the government<sup>34</sup> to refer the matter to the Supreme Court,

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<sup>33</sup> Gomez, M., "The Northern Polls" in *Law & Society Trust Fortnightly Review*, Volume V, Issue 28 (September, 1994) p 69; MFFE Report, pp 24-26; International Observer Report, pp 27-28; International NGO Report, p 44; 'Jaffna Not Ready for the Polls - GA' in *The Sunday Times*, 24 July 1994

<sup>34</sup> Civil Rights Movement, Document E 01/7/94

invoking its consultative jurisdiction under the Constitution,<sup>35</sup> was also ignored.

Eventually, the TULF took the matter to court. However, the Court of Appeal refused to issue writs of certiorari and prohibition to prevent the holding of elections in the Jaffna district on the basis that the application was premature. The Supreme Court, too, refused to entertain a fundamental rights petition alleging a violation of the right to equality on the basis that the decision of the Elections Commissioner did not constitute "executive or administrative action" as required by Article 126 of the Constitution which confers exclusive fundamental rights jurisdiction to the Supreme Court. Also, the petitioner's failure to join as parties to the petition representatives of political parties who had submitted nomination papers for the electoral district of Jaffna was considered a fatal defect.<sup>36</sup>

The net result was that only 13,000 of the 600,000 registered voters (about 2.32%) in the Jaffna district voted. Voting took place mostly in the outlying islands controlled by the EPDP on behalf of the government. International observers who monitored the poll in Jaffna district reported many irregularities, including instances where voters blatantly voted more than once in their own presence. They also reported the abuse of the process by the EPDP, mainly through

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<sup>35</sup> Article 129 gives the president the power to invoke the consultative jurisdiction of the Supreme Court where a question of law or fact of such a nature and of such public interest has arisen it is thought expedient to obtain such an opinion.

<sup>36</sup> Supreme Court Application No. 201/94. Order delivered on 25 July 1994



intimidation. In one incident, when an observer in the polling station had pointed out that a person being allowed to vote already had his finger marked by indelible ink (indicating a vote had already been cast) the Presiding Officer had responded "yes, but he has not voted here before!"<sup>37</sup>

In the Vanni district only 42% of the polling stations could function because of the prevailing situation. Approximately 25% of the registered voters cast their ballots. According to the MFFE team the poll in Vanni was free and efficient but "may be not fair."<sup>38</sup>

To take matters to a bizarre conclusion, under the electoral system of Sri Lanka, 2.32% of voters in the Jaffna district returned 10 members of parliament; i.e., nearly 5% of the total number of seats in parliament (9 from the EPDP and 1 from the SLMC). In the Vanni district, 25% of voters returned 6 members of parliament.<sup>39</sup>

In contrast, the troubled districts of Trincomalee, Digamadulla and Batticaloa in the east of the island polled respectively 68.78%, 81.25% and 72.40% of total registered votes. International observers who monitored elections in those districts expressed satisfaction over the conducting of the poll in those areas.<sup>40</sup>

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<sup>37</sup> International Observer Report, p 28

<sup>38</sup> MFFE Report, p 26

<sup>39</sup> Figures given in MFFE Report, Annex I. Compare these figures with those in Ratnapura district where 483,896 (87.25% of registered voters) cast their votes and returned 10 representatives and where in the Kalutara district 530,757 voters (82.14% of voters) returned 10 candidates.

<sup>40</sup> International Observer Report, pp 29-30



After a meeting of political parties called by the Commissioner of Elections on the day after the election to obtain their views on the polls in Jaffna and Vanni districts, the results of the two districts were released. Had he not done so, under the election laws of Sri Lanka the election could not have been declared to be concluded. The 29 national seats cannot be filled without computing the islandwide percentage of votes each party obtained.

In the light of the fact that the PA did not obtain a clear majority, paving the way for a coalition government, the results from Jaffna and Vanni districts had a significant effect on the outcome of the election.

## **6. Polls and the Internally Displaced**

Of the approximately 600,000 internally displaced persons generated by the civil war, only 19,000 were accepted for registration by the Elections Commissioner.

By law, displaced persons have the right to vote for candidates standing in the district of their original residence. They can vote from their places of refuge, provided that their names appear on the electoral registers being used.

For purposes of registration of the displaced, a special form was issued seeking many details which had to be sent in before the deadline set by the Commissioner. The time between receipt of the form by many and the deadline was very short, creating grave obstacles. To add insult to injury, most of the forms were issued in Sinhala whereas a majority of the displaced, including Muslims, speak Tamil.

Of the 25,000 displaced applicants only 19,000 were registered to vote. No reasons were given for refusing to register the other applicants.

According to the International NGO Report, of 2,500 who applied from the Asikulam camp in Vavuniya in the Vanni district, only 75 were accepted for registration by the Commissioner. Even then, when those fortunate enough to be registered presented themselves to cast votes, some were informed that their names did not appear on the electoral lists sent by the Commissioner.<sup>41</sup>

For example, the SLMC had procured from the Commissioner's office in Colombo the names of 6,100 persons in the half-dozen Puttalam camps who had received authorisation letters to vote for candidates in their native Jaffna. But the local polling authorities received lists of eligible displaced persons that contained only about 3,000 names.<sup>42</sup>

Considering that only 2.3% of voters in Jaffna district and 25% from the Vanni district voted, if a larger number of persons displaced from those districts could have voted, the result would have been more representative.

## **7. The Verdict**

While the observers and the general public were all gravely concerned about the anomalous situation in the Jaffna and

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<sup>41</sup> International NGO Report, pp 30-31

<sup>42</sup> *Ibid*, p 45

Vanni districts, there appears to be a general consensus that representation in the current parliament is based, to a large extent, on the free will of the electorate. The minority report issued by eight members of the International Observer Group invited by the Elections Commissioner took strong exception to the main report on the basis that election-related violence and other shortcomings of the election were not given adequate consideration. Nonetheless, the eight members were of the opinion that:

*[n]otwithstanding these qualifications, there is no disagreement within the International Observer Group that the Election has resulted in a peaceful transfer of power which is in accordance with the wishes of the majority of the electorate.*

The peaceful transfer of power after the announcement of the result certainly bodes well for the future of democracy in Sri Lanka.

## **8. The Presidential Election of 1994**

As required by the Constitution, presidential elections were scheduled for November 1994. At the 9 November polls the incumbent Prime Minister, Chandrika Kumaratunga, won the presidential election by a majority of two million votes. Her election platform promised the initiation of dialogue with the LTTE in pursuit of a peaceful solution to the conflict and the rooting out of corruption and violence.

On 24 October, UNP presidential candidate Gamini Disanayake was killed along with over 50 persons, including

several ministers and the Secretary General of the UNP, in a suicide bomb attack on a UNP rally in Colombo. It was widely believed that the LTTE was behind the bombing. The assassination was a major setback to the goal of ending the culture of violence and the PA's peace initiative. The campaign was resumed after the funeral, albeit on a low scale.

Election monitoring by local observers was conducted by PAFFREL and MFFE on a scaled-down level, with the assistance of expatriate human rights activists such as members of the Peace Brigade International. Once again the Elections Commissioner invited a team of international observers, this time consisting of only 20 observers, 18 of them from South Asian countries and two representing the International Commission of Jurists.

There were a number of incidents of pre- and post-election violence reported. However, they were not considered to be of a magnitude to nullify the unprecedented majority of the victor. For example, the International Observer Group reported that in the Kandy district, Pathadumbara division, seven polling boxes were forcibly captured by armed gangs who also seized ballot papers, and marked and stuffed them into the boxes. The Matale district once again witnessed several serious incidents of election-related violence. In the Lenadora division of Dambulla district two persons were seriously injured by sword cuts and were admitted to the hospital. In the Kawatayamuna polling division a jeep belonging to the Mayor of Matale was hijacked with its occupants.<sup>43</sup>

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<sup>43</sup> *Presidential Election Sri Lanka-1994: Report of the International Poll Observers* (November 1994) (hereinafter *International Observers Report - 2*) pp 9-10

As with the parliamentary election, observers expressed concern over the situation in the Jaffna district where once again very few registered voters (2.97%) were in a position to cast votes. Once again, instances of impersonation and repeated voting by the same voter were reported. Special official favours bestowed on the EPDP, which was co-operating with the military in the North, also attracted the concern of the Observer Group.<sup>44</sup>

Similarly, the disenfranchisement of thousands of displaced persons continued to be a major concern.<sup>45</sup> This was in spite of strong recommendations made to the government by all observer groups at the parliamentary election to take steps to register displaced persons in the electoral registers and to relax the formalities associated with that process, given the difficult circumstances they faced, so that they could vote at the forthcoming presidential election. There were also complaints of the misuse of all state-controlled media to favour the PA during the presidential election campaign.<sup>46</sup>

Ironically, this time around supporters and politicians of the PA, who had suffered much during previous elections, were found to be responsible for a majority of incidents

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<sup>44</sup> *Ibid*, p 11

<sup>45</sup> *Ibid*, p 10

<sup>46</sup> See Article 19, *Words into Action: Censorship and Media Reform in Sri Lanka*, Censorship News Issue 39 (London, March 1995) p 7; see also Chapter VIII, Freedom of Expression and the Media

of election violence.<sup>47</sup> In spite of the declaration of curfew some incidents of post-election violence were reported, including one where 12 shops belonging to persons thought to be supporters of the UNP were destroyed allegedly by PA supporters in the Panwila area of Kandy district.<sup>48</sup> It may be small comfort to the victims that the preamble of the PA manifesto categorically declared:

*Dear Voter, you can rest assured that once the PA wins, the life and property of not even a single citizen of this country will be subjected to any risk. For in our view these rights are sacred and inviolable under any circumstances and it is the bounden duty of the state to protect them. It is also our responsibility to protect the life and property of every citizen and to maintain law and order.*

In fairness it must be stated, however, that the leadership of the PA, especially Chandrika Kumaratunga, did make strong appeals to supporters during both election campaigns to desist from violence.

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<sup>47</sup> A preliminary report issued by PAFFREL and MFFE soon after the presidential election polling comments that "... it is distressing that PA candidates and their supporters who are rightly vehement in their criticisms of UNP violence in August have this time resorted to acts of intimidation and, in two cases, of malpractice of stuffing of ballot boxes" and also that the "police seem to have changed not their methods of operation but their political masters." (As quoted in *INFORM Situation Report -November 1994*, p 6)

<sup>48</sup> *INFORM Situation Report - November 1994*, p 6



## 9. PA's Agenda for Change

The PA took office on a solemn pledge of good governance, assuring the electorate it would root out anti-democratic practices and embark on an agenda of reform to entrench democracy. The endorsement of the PA's political platform is an expression of the desire of the people to win back their rights. Many, including those who supported the PA, consider it crucial that the policies and action of the PA are now kept under scrutiny to prevent future digressions.

The PA manifesto emphasised the need to abolish the executive presidential system and return to a system of Westminster-style parliamentary democracy. The manifesto also pledged to hold periodic elections, being the "lifeblood of the processes of representative democracy" and to do away with the pernicious practice of holding referenda designed to extend the lifetime of parliament. Further, it pledged that:

*The Government's powers to change laws governing any aspect of the conduct of elections, by having recourse to Emergency Regulations promulgated under the Public Security Ordinance, will be removed. The enactment and modification of laws pertaining to elections will be a function entrusted exclusively to Parliament. The authority of the Commissioner of Elections to ensure the conduct of free and fair elections and in particular to issue necessary directions to police officers, in connection with the conduct of the poll, will be strengthened.<sup>49</sup>*

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<sup>49</sup> Manifesto of the PA government (Government Information Department, 1994) p 11 (point 6 under "Constitutional Reform")



Constitutional reforms proposed by the PA administration have focused on the need for greater devolution of power to ensure greater political participation at the periphery. This proposal is mainly a response to the demands of the minority Tamil community of the North East for greater political autonomy. According to the Minister of Justice, Constitutional Affairs and External Trade, this is to be combined with, *inter alia*, a stronger chapter on fundamental rights in the proposed constitutional reforms.<sup>50</sup>

The PA administration has from its inception pledged to engage in a dialogue with the LTTE in search of a peaceful political solution to the ethnic conflict in Sri Lanka. The huge majority obtained by President Kumaratunga is considered a strong mandate given by the electorate to her administration to engage in a peace process to seek a political solution to a protracted problem which seriously affects the political rights of the people.

The government has said that the electoral system will be reformed to combine the "first-past-the-post" system with proportional representation to ensure a closer linkage between the voters and their local representatives, as in the German electoral system. This is to meet the criticism that the current system of proportional representation, while fairly expressing the overall will of the electorate, has denied voters the right to vote directly for a candidate of their choice from the immediate electorate.

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<sup>50</sup> Interview with Minister of Justice G.L. Peiris published in *The Sunday Times*, 12 February 1995, p 10

## 10.    **Conclusions**

While the reform of the electoral system is crucial for the affirmation of democracy, there must be the recognition that it is only a first step. Free and fair elections alone cannot define the democratic nature of the state: there must also be accompanying guarantees necessary to sustain the democratic participation of the people in the decision-making process between elections. For example, the adoption of a democratic media policy, respect for freedom of association, assembly, and opinion, ensuring non-discrimination, use of emergency powers strictly within the limits of the law, and removing the climate of impunity are all equally important.

Similarly, the development not only of laws but also of democratic conventions or practices regarding governance is critical. Previous egregious violations occurred while reasonable written guarantees were available.

The challenge presently facing the PA is to match words with deeds. The challenge for the people of Sri Lanka is to be vigilant in jealously protecting their hard-won political freedom and to build a genuinely democratic political culture.

### III

## Emergency Rule

Emergency rule prevailed throughout most of 1994, with a short break just before the parliamentary general election. There were, however, important changes, both in the geographical areas in which the emergency was in force during different periods, as well as in the content of the regulations. Emergency rule during this year followed an exceptionally tortuous maze in which lawyer and layman alike lost their way, seldom to emerge. The basic chronology in Appendix I to this chapter may help the reader avoid this fate.

Emergency rule in Sri Lanka takes place under the Public Security Ordinance. The way in which this operates was described in the chapter on Emergency Regulations in *Sri Lanka: State of Human Rights 1993*.<sup>1</sup>

In January 1994 the new regulations relating to incitement and distribution of leaflets, among other things, which had been introduced only the previous month and had evoked strong criticism, were changed. The "incitement" regulation<sup>2</sup>

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<sup>1</sup> (Law & Society Trust, Colombo, 1994)

<sup>2</sup> Reg. 25A of the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1993

was re-worded, and the regulation relating to posters, handbills and leaflets was rescinded altogether.<sup>3</sup> Apart from this, emergency rule continued very much as before up to midnight of 15 July when it was allowed to lapse. This was consequent to the dissolution of parliament which had taken place on 24 June. It was possible, legally, for the president to re-summon the dissolved parliament solely for the purpose of renewing the emergency, but he chose not to do so. Thus, for the first time in five years there was a period during which the whole of Sri Lanka was free from emergency rule. President Wijetunga re-introduced emergency rule with effect from 6 p.m. on 16 August, after the voting in the parliamentary general election had closed.

The version of the Emergency (Miscellaneous Provisions and Powers) Regulations promulgated this time, however, contained certain changes. These appeared to be an attempt to meet the sustained criticism that had continued from human rights circles both in Sri Lanka and abroad. Preventive detention on the order of the Defence Secretary was limited to a maximum period of one year. Indefinite extensions, however, remained possible on the order of a magistrate. Another change related to where an arresting officer is not able to issue a "receipt" to the relatives of the arrested person. In such an event an entry in the Information Book of the police station must be made explaining the reason why, and non-compliance is made an offence.

At the same time, i.e. on 16 August 1994, President Wijetunga introduced 24 emergency regulations dealing with varying

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<sup>3</sup> Reg. 25B

subjects with differing degrees of relevance to national security. Most of them were a straightforward re-introduction of provisions that had been in force before the emergency lapsed in July; these included the regulations relating to finance companies, banking, monitoring of NGOs, and amendment of the Universities Act. A welcome absentee was the Emergency (Prevention of Subversive Political Activity) Regulations. New regulations related to subjects such as invalidating the notice calling for the nominations to the North-East Provincial Council, the affiliated University of Kelaniya, and declaring 17 and 18 August a holiday for private sector employees.

The result of the general election was a victory for the opposition PA, thus ending a 17 year period of UNP rule. Under the Constitution, however, the incumbent president continued in office. This created an anomalous situation, fraught with many possibilities for conflict. One such potential for conflict was the imposition and continuance of emergency rule under the Public Security Ordinance. For whereas the proclamation of the emergency, and the making of emergency regulations, are the act of the president, the proclamation has to be approved each month by parliament.

In this event, however, no overt confrontation occurred, and a process of successful negotiation appears to have taken place. When the new parliament met the previous proclamation was allowed to lapse and a fresh proclamation made by the president on 1 September effective from 4 September was approved. This limited emergency rule to the Northern and Eastern Provinces and border areas. A fresh version of the Emergency (Miscellaneous Provisions and Powers) Regulations was made. In this the offences relating to

essential services, and the provision relating to householders supplying information to the police, were dropped. So, unfortunately, was the requirement of reporting arrests to the HRTF. Other regulations were made relating to restriction on transport of articles, and establishment of a prohibited zone. The large array of regulations on miscellaneous other subjects was not re-introduced.

The assassination, during the presidential election campaign, of the UNP candidate Gamini Dissanayake and other UNP leaders, created a new situation. Some 55 persons were killed in this attack by a suicide bomber which took place at an election rally in Colombo on 24 October. President Wijetunga immediately declared emergency rule throughout the country once again, and brought into force yet another set of the Emergency (Miscellaneous Provisions and Powers) Regulations. These more or less corresponded with those of 16 August (with, however, the continued omission of the requirement to report arrests to the HRTF).

The process of political negotiation apparently resumed and by the time the emergency came up for renewal again in parliament, a fresh course had been decided on. The emergency declared on 24 October was revoked by President Wijetunga and a new proclamation was made bringing emergency rule into force as from 4 November 1994 in the Northern and Eastern Provinces and border areas, and in Colombo and surrounding regions.<sup>4</sup> Yet another version - the fifth in force for the year - of the Emergency (Miscellaneous Provisions and Powers) Regulations was made. This reverted in content to the more moderate version of September 1994. Two

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<sup>4</sup> For precise geographical details see Appendix II



additional regulations dealt with restriction of transport of articles and the establishment of a prohibited zone.

The presidential election took place on 9 November 1994. On 7 November the regulations were amended so as to make them not applicable in Colombo and surrounding areas for two days, namely midnight 7 November to midnight 9 November. This was erroneously thought by many to have been a lifting of the emergency for the whole country for the purpose of the election; in fact emergency rule continued unchanged in the Northern and Eastern Provinces and border areas. Chandrika Kumaratunga of the PA was elected president. On 4 December she made a Proclamation renewing the emergency, with no change as to the geographical areas concerned, and by operation of law the same regulations continued to be in force.

At the end of the year very few people knew what regulations were in force and where. Many, including some law enforcement and other government officials, were still under the impression that the emergency was operative only in the North East. The year had seen no less than five distinct spells of emergency rule and one emergency-free period. Of the periods of emergency rule, four had been in succession without a break. It is necessary to remember that these are nevertheless legally separate, and that therefore previous regulations lapsed each time, and only freshly made ones had legal effect during the period in question. It was left to NGOs, notably the Nadesan Centre, to keep track of changes and to inform lawyers and others through the issue of its *Docinform* library circulars; judicial officers too have come to rely on these.



As regards the content of the emergency regulations in force at the end of the year, the following observations may be made.

### **Omission of multifarious regulations**

The exclusion of the large array of emergency regulations on a variety of subjects is welcome. There are now only the Emergency (Miscellaneous Provisions and Powers) Regulations and a few others which are comparatively easy to keep track of.

### **Essential services; householders and lodging-house owners**

The omission of the offences relating to essential services, and of the provision requiring householders and lodging-house owners to supply information to the police, are likewise to be welcomed.

### **Preventive detention**

The modification of preventive detention under Regulation 17 still leaves much to be desired. Formerly, the Secretary to the Ministry of Defence could prolong such detention indefinitely. Now, after one year has elapsed, the period of detention can be extended only by a magistrate. The magistrate is furnished with a report from the Secretary "setting out the facts upon which the person is detained and the reason which necessitates the extension of such period of detention." Where the magistrate is satisfied that there are reasonable grounds, he or she may extend the detention. The report is *prima facie* evidence of its contents, and the Secretary "shall not be required to be present or

called upon to testify before the Magistrate." There is no provision that the report be made available to the detained person so that he or she may counter its contents.

Although the transferring to a judicial officer of the authority to decide whether or not to extend a person's detention must be welcomed, the above provisions mean that the magistrate's function is circumscribed. Coupled with the fact that there is still no maximum period of detention stipulated, this means that the improvement is not as significant as it may at first glance appear. Furthermore, it must be noted that the magistrate has no control over where or under what conditions the detainee is held, which remain solely a matter for the Secretary to determine.

#### **Arrest under Regulation 18 - reporting to the HRTF**

Some improvements were introduced in August: namely, specific penalties were imposed for failure to follow prescribed procedures (such as the issue of "receipt") on arrest, and holding persons in unauthorised places of detention. However, although the requirement to report all arrests to the HRTF remained in the August regulations, it was excluded from the subsequent ones.

This is a matter for grave concern. A possible reason for this requirement being omitted is that the emergency regulations governing the creation and functioning of the HRTF were themselves not promulgated again after they lapsed in September. But this is no justification. These regulations were not on par with the many earlier regulations unconnected with national security, and should not have been jettisoned along with them. It is unsatisfactory that

the status of the HRTF should itself be made unclear. The HRTF has, despite its shortcomings, acted swiftly and effectively in many cases. So long as emergency regulations and the Prevention of Terrorism Act (PTA) remain in force in any part of the country, it is essential that an organisation such as the HRTF exists with effective powers, and with offices in various areas around the country.

### **Conditions of detention**

This issue remains a grave blot on our society. There remain no prescribed conditions of detention whatever as regards persons held under emergency powers in places other than prisons. (This applies to persons held under the PTA as well). Even as regards such persons held in prisons, the Defence Secretary may suspend provisions of the Prisons Ordinance or the Prison Rules; there is no fetter whatever on this power. "When and what a person eats and drinks, when and where he sleeps, whether or not he has a bath, has the use of a toilet, has medical attention, reading material, sees his family, or writes or receives letters, depends entirely on the decision of a government official."<sup>5</sup>

### **Police custody**

The provisions enabling prolonged detention in police or military custody remain unchanged. As regards persons arrested on suspicion of having committed offences (regulation 18), limitations were introduced in June 1993, and these remain. (The maximum period is 48 hours plus seven

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<sup>5</sup> CRM, February 1993, echoing appeals repeated since the organisation's inception in 1971.

days in some cases, and seven days plus 60 hours in other cases, depending on geographical factors). As regards persons subject to preventive detention under Regulation 17, however, detention in police or military custody can still be of indefinite duration.

### **Inquests**

The provisions regarding inquests remain as before, and are unacceptable. The normal law makes an inquest mandatory whenever a person dies in custody. Under the emergency regulations this can be bypassed where a police officer or member of the armed forces claims the death took place in the course of an "armed confrontation." An inquest thereafter is held only if the Inspector General of Police (IGP) so decides, and is very different in nature from a normal inquest. It is held by the High Court of Colombo, and only considers such evidence as the IGP places before it. The provision that evidence could also be taken "of any other person who appears to be acquainted with the circumstances relating to the death" was deleted in July 1989 and remains unrestored.

### **Lack of clarity**

The wording of the provisions relating to arrest and detention are convoluted and it is with great difficulty that one can extract their meaning. This is particularly so as regards the different provisions applicable in respect of different parts of the country. Redrafting in simpler form is urgent in the interests of law enforcement officers as well as the general public.

## Errors and anomalies

The Emergency (Miscellaneous Provisions and Powers) Regulations are replete with errors and anomalies. These vary in their seriousness, but the fact remains that to command respect, any law should be logical and reasonable. They clearly need an overall scrutiny and revision.<sup>6</sup>

## Non-publication of authorised places of detention

A strange episode during the first part of 1994 was the publication of Gazette Extraordinary No. 806/6 *dated 15 February 1994*. This carried a notification of two further authorised places of detention, namely the Army Detention Camp, Panagoda and the Crime Detective Bureau Headquarters, Gregory's Road, Colombo 7, thus adding to the list of places of detention already published in the Gazette of 29 June 1993. What is very odd about this notification is that it *bears the date 1 October 1993*, i.e. four and a half months earlier than the date of the Gazette. (To make matters worse, this Gazette was actually received through the post by subscribers only two and a half months later, in May 1994.) It is significant in this connection to note that in February 1994 Amnesty International (AI) had raised the issue of the alleged ill-treatment in custody of a detainee at the Panagoda Army Camp, and had pointed out that the Panagoda Camp was not among the authorised places of detention. The emergency regulations provide that no person shall be detained at any place other than a place

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<sup>6</sup> The above observations are drawn from the CRM's statement, 'The Current Emergency Regulations,' dated 29 November 1994 (CRM ref 02/11/94)

authorised by the Secretary to the Ministry of Defence, that breach of this is an offence, and that the Secretary shall cause a list of authorised places of detention to be published in the Gazette.

All lists of authorised places of detention previously published ceased to have legal effect after the emergency lapsed in July 1994. Although emergency rule was re-introduced in August 1994, and was in force until the end of the year, no fresh list of authorised places of detention appears to have been made until 15 December 1994 (published in the Gazette of 26 December 1994). It would therefore appear that all detentions under emergency regulations which took place between 16 August and this date are illegal.

The list specifies 81 places of detention, of which 68 are police stations or other police establishments.

### **Non accessibility**

The non-accessibility of emergency regulations and orders and notifications made under them remains a serious problem. How serious this can be is illustrated by the strange circumstances surrounding the very belated notification of Panagoda Army Camp as an authorised place of detention referred to above. At the end of the year the CRM renewed yet again its appeal that all such regulations and notifications be published in full in the Sinhala, Tamil and English press no sooner they are made.



## APPENDIX I

### Emergency Rule 1994 - A Chronology

#### 1 JANUARY 1994 TO MIDNIGHT 15/16 JULY 1994

*The previous emergency rule continues. The Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1993 continue in force, together with a large array of other regulations.*

#### 16 JULY TO 16 AUGUST 1994

*No emergency rule in any part of Sri Lanka.*

#### 16 AUGUST (6 p.m.) TO 4 SEPTEMBER 1994

*Emergency operative throughout Sri Lanka. Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1994 in force, plus 24 other regulations. Changes in provision regarding preventive detention. Obligation to report arrests to HRTF remains.*

#### 4 SEPTEMBER TO 24 OCTOBER 1994

*Emergency confined to Northern and Eastern Provinces and border areas i.e. parts of the Puttalam, Anuradhapura and Polonnaruwa districts. Regulations unconnected with national*



*security not re-introduced. Emergency (Miscellaneous Provisions and Powers) Regulations No. 2 of 1994 in force. Offences regarding essential services and requirement that householders furnish information to police dropped. Obligation to report arrests to HRTF also omitted.*

#### **24 OCTOBER TO 4 NOVEMBER 1994**

*Emergency rule operative throughout Sri Lanka. Emergency (Miscellaneous Provisions and Powers) Regulations No. 3 of 1994 in force. Same in substance as Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 1994 operative during August/September (see above). However obligation to report arrests to HRTF not restored.*

#### **4 NOVEMBER TO 31 DECEMBER 1994 (and continuing)**

*Emergency rule operative in Northern and Eastern Provinces and border areas, and Colombo and surrounding regions (see Appendix II for details). Emergency (Miscellaneous Provisions and Powers) Regulations No. 4 of 1994 in force. Same in substance as Emergency (Miscellaneous Provisions and Powers) Regulations No. 2 of 1994 in force during September/October (see above).*

## **APPENDIX II**

The areas in which Part II of the Public Security Ordinance was in force at the end of the year as per Proclamation by President D.B. Wijetunga in Gazette Extraordinary No. 843/11 of 4 December 1994 and repeated in Proclamation by President Chandrika Bandaranaike Kumaratunga in Gazette Extraordinary No. 848/1 of 4 December 1994.

*The Municipal Limits of Colombo, Dehiwala-Mount Lavinia, the Divisional Secretaries' Divisions of Nugegoda and Kolonnawa of the Colombo District, the Divisional Secretaries' Divisions of Wattala, Ja-Ela and Negombo of the Gampaha District, the Northern Province, the Eastern Province, the Divisional Secretaries' Divisions of Kalpitiya, Wanathawilluwa, Karuwalagaswewa of the Puttalam District; the Divisional Secretaries' Divisions of Nochchiyagama, Nuwaragampalatha (Central), Medawachchiya, Kebithigollawa, Padaviya and Horowpathana of the Anuradhapura District and the Divisional Secretaries' Divisions of Dimbulagala and Lankapura of the Polonnaruwa District.*

## IV

# Respect for the Integrity of the Person

### 1. Introduction

This chapter contains a discussion of the rights to life, freedom from torture and disappearance, liberty and fair trial. There are several international human rights standards relevant to these rights, most important of which are the ICCPR and the Torture Convention. Sri Lanka became a party to the ICCPR in 1980 and to the Torture Convention in January 1994.<sup>1</sup>

Each section provides an outline of the relevant international standards, the extent to which the right is protected in Sri Lankan law, and an assessment of the extent to which the right concerned was protected in practice during 1994.

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<sup>1</sup> Further international standards relevant to personal integrity rights are listed in *Sri Lanka: State of Human Rights 1993* (Law & Society Trust, Colombo, 1994)

## 2. Right to Life

The right to life is protected under Article 6 of the ICCPR. Under Article 4, no derogations can be made from this right in any circumstances. Yet the right to life - the most basic of human rights - does not receive protection under the 1978 Constitution of Sri Lanka. The only express protection of the right to life provided under the Constitution is the prohibition, under Article 13(4) of punishments of death or imprisonment being awarded "except by order of a competent court, made in accordance with procedure established by law..." Such procedure, however, includes emergency regulations, which are issued by the executive without debate and bypass some of the safeguards contained in the Code of Criminal Procedure.

Although it has not been used since 1976, the death penalty remains available as a punishment for certain crimes in Sri Lanka and death sentences are sometimes awarded by the courts. In practice, death sentences have regularly been commuted by the president, and judicial executions have not been carried out. The process of revising the Constitution, which began in 1994 and is due to conclude in 1995, provides a clear opportunity for Sri Lanka to formally abolish the death penalty under the Constitution, in keeping with its *de facto* abolitionist practice of nearly 20 years.

Major violations of the right to life have been committed in recent years in Sri Lanka, particularly in the contexts of the Southern insurgency from 1988 to 1990 and the conflict in the North East. These have taken many forms, including the arbitrary and illegal killing of civilians and deaths in custody resulting from torture or from summary

execution. The majority of the tens of thousands of people who have disappeared while in custody since 1984 are presumed by many to have been killed.

The fact that the most widespread and systematic violations of the right to life have taken place in the context of armed conflict with the state does not mean that safeguards need only to be considered in that context. Torture - which is inflicted on individuals who are in a powerless position and unable to offer resistance - may in extreme cases cause death and continued in 1994 to be inflicted on prisoners held in connection with the conflict in the North East, as well as those suspected of criminal offences held in police stations in the South. Emergency regulations on postmortems and inquests fail to ensure that inquiries into such killings will necessarily be held, and could be used to cover up such killings.<sup>2</sup> Additionally, the use of force in law enforcement also needs to be kept under close review. International standards provide clear principles of proportionality and necessity to guide the use of force in law enforcement. For example, Article 3 of the Code of Conduct for Law Enforcement Officials permits the use of force only when "strictly necessary and to the extent required for the performance of their duty," and the use of firearms only when faced with armed resistance.

## **2.1 Reported Cases of Illegal Killings**

The illegal killing of unarmed civilians in the North East continued to be reported in 1994, but in reduced numbers

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<sup>2</sup> Chapter III on Emergency Rule discusses the substance of these regulations

compared to earlier years. Among the incidents reported were the following:

- \* the killing by the Special Task Force (STF) in July 1994 of four civilians at Palkudah, south of Thirukkivil, in apparent retaliation for the deaths of at least four STF personnel earlier, in an armed encounter with the LTTE;
- \* the killing of two persons by the army at Eravur Pattu in late October 1994; their bodies were reportedly disposed of;
- \* a man named Navaratnam was reportedly beaten by the STF in late October after he had been pointed out as the father of a former LTTE member. The STF were said to have followed him home from his paddy field at Sagamam, Amparai district, beaten him to death, and thrown his body into a well.

Civilians were also reported to have died during aerial attacks and shelling by the army up to late September 1994, and in air force attacks on boats crossing the prohibited zone of Jaffna lagoon. At least 20 civilians were reported to have been killed in this manner, including in the following incidents:

- \* on 15 and 16 February, there were aerial attacks on Nochchikkudah, in which two women and two men died;
- \* on 26 February, one or two civilians were reportedly killed when the airforce attacked a boat crossing Jaffna lagoon;
- \* five shells were fired into Jaffna town on 15 March, reportedly killing four civilians, after the LTTE had killed a group of Sinhalese fishermen;

- \* from 11 to 13 June, shells were fired into several Roman Catholic areas where festivals were being celebrated, killing six people and injuring more.

By the end of March 1994, 11 Tamil fishermen - who were fishing in contravention of the ban on fishing in the North - were reported to have been killed in attacks on them by the navy.

Some illegal killings were reported to have been committed in the early part of the year by armed Tamil groups working alongside the security forces. For example, in February the leader of one such group in Batticaloa was reported to have illegally executed a man known to have helped the LTTE. He had apparently summoned this man to come ashore from his fishing boat on the lagoon. As the boat came toward the shore he shot the man in the thigh; as the man pleaded for his life, he shot him in the head and killed him.<sup>3</sup> Reports of such killings by these groups were largely confined to the first months of 1994.

The LTTE were also reported to have arbitrarily killed civilians, including the Sinhalese fishermen referred to above.

### **3. Torture**

The right to be free from torture is guaranteed under Article 7 of the ICCPR, and under Article 4 is non-derogable. This right receives protection under Article 11 of the Constitution of Sri Lanka, and is subject to no restrictions.

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<sup>3</sup> University Teachers for Human Rights (Jaffna) Report No. 13



Constitutional protection, however, is inadequate in itself to protect against torture, and it has continued to be practised extensively, both by the military and the police. To eradicate torture, a wide range of legislative, administrative and political measures are necessary, including reorganisation of the police force, the institution of strict legal controls relating to custody and interrogation procedures with effective enforcement mechanisms, and the establishment of independent machinery to investigate complaints against the police.<sup>4</sup>

The most significant steps taken towards the prevention of torture in 1994 were, first, the accession to the Torture Convention by the UNP government in January 1994 and, second, the introduction by the PA government in November 1994 of enabling legislation to give effect to provisions of the Torture Convention.

- ✧ In acceding to the Torture Convention, Sri Lanka undertook to "take effective legislative, administrative, judicial and other measures to prevent acts of torture." The Convention requires that torture be made punishable as a crime of a "grave nature" and the authorities must examine allegations of torture promptly and impartially. Fair compensation and rehabilitation should be provided to victims. Statements made under torture must never be used as evidence in court - except when alleged torturers are being tried, in which case such a statement can be introduced as evidence that the statement was made.

Sri Lanka did not make the additional declaration under Article 22 of the Torture Convention which would enable the committee set up under the Convention to entertain

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<sup>4</sup> See CRM, *The Anti-Torture Bill*, E 03A/11/94, 30 November 1994

complaints from individuals. Such complaints can only be entertained after local remedies have been exhausted.

- ✓ The Anti-Torture Bill,<sup>5</sup> was passed by parliament on 25 November 1994 without debate. Indeed, at least one local human rights organisation had believed it was scheduled to be taken up the following month, and had thus not made its representations on the shortcomings in the content of the Bill known in advance.<sup>6</sup>

The anti-torture legislation is flawed in several respects and fails to implement the Torture Convention in full. First, the definition of torture provided in the legislation is narrower than that given in the Convention. In the Convention, torture is described as causing "severe pain or suffering;" yet the legislation contains no reference to "suffering." Second, the Convention gives several examples of the purposes for which torture might be inflicted, but this list is not intended to be exhaustive. The legislation, on the other hand, presents these same examples in such a way as to make them the definitive set of purposes for which torture is inflicted. Further, the legislation omits an important qualification concerning the definition contained in the Convention which reads: "This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application." Given that the Convention itself provides that the imposition of "lawful sanctions" does not amount to torture, it is important

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<sup>5</sup> Bill to give effect to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and for matters connected therewith or incidental thereto

<sup>6</sup> CRM, *The Anti-Torture Bill*

that this qualification be included to prevent any future introduction of cruel "lawful sanctions" which remain forbidden by international law and by Sri Lanka's own Constitution.

Another flaw in the legislation is that it does not contain provisions to implement the sections of the Convention dealing with forcible repatriation to a country where the person concerned would be in danger of being subjected to torture.

### 3.1 Reports of Torture

Despite the constitutional protection against torture, the practice is widespread in Sri Lanka, as attested to, for example, by the HRTF in its annual reports.<sup>7</sup> Torture has often resulted in the death or disappearance of prisoners. Yet, despite the importance of this issue, relatively few fully documented cases are available.

The HRTF comments that "in Sri Lanka we have Government tolerated torture. Torture cases when brought to light rarely attract Governmental action. All that the victim can do is to appeal to the Supreme Court... Yet in practice only a very small number of torture victims have the resources and the will to brave possible reprisals to have recourse to Court action."<sup>8</sup>

Reports of torture continued to be made from the North East. The issue of receipts upon arrest, as required under the emergency regulations, was said to be some safeguard

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<sup>7</sup> HRTF, *Annual Report: 10 August 1993 to 10 August 1994*; and *Annual Report: 10 August 1992 to 10 August 1993*

<sup>8</sup> HRTF, *Annual Report: 10 August 1993 to 10 August 1994*, p 31

against the worst abuses. But this procedural requirement under the emergency regulations was not uniformly implemented. In Batticaloa, the activities of an independent civilian body in pursuing instances of non-issue of receipts was said to have had some effect in preventing torture. Elsewhere, however, receipts were not necessarily issued on arrest and some of the worst abuses are said to have taken place in these contexts.

In one reported case, 10 farmers were arrested in Unnichchai in July 1994, and later released. Two of them suffered injuries: one to his arms; the other to his thumbs. They had apparently had their thumbs tied together behind their backs, and been suspended in the air from their thumbs. Receipts were issued only two days after their release.

That "security" detainees are not the only prisoners vulnerable to torture was illustrated in a fundamental rights case filed in the Supreme Court in 1994 alleging torture by the Gokarella police.<sup>9</sup> W.A. Ranjan Weerasuriya said he had been arrested on 13 May 1994 by Gokarella police officers who wished to take a statement from him about a robbery. He was remanded from 20 May 1994 to 2 June 1994, when he was released on bail. According to his account, the torture inflicted on him included being assaulted with a club; handcuffed to a pillar and assaulted and kicked until he lost consciousness; being stripped and, with his hands tied behind his back, being suspended in the air from his hands and beaten on the chest and shoulders. Burning charcoal and chili powder were held to his face and he again lost consciousness. In addition, he said his testicles were hit

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<sup>9</sup> *Daily News*, 1 September 1994

and something inserted into his anus. After his release on bail he received private medical treatment and then found that he had lost his job. He received assistance from the HRTF to file his case, the outcome of which is not known.

In its 1994 report, the HRTF has not documented individual cases of torture such as the one described above. It does, however, provide a list in Annex 14 of the most frequent methods of physical and mental torture practised and their sequelae. The list contains 12 methods of physical torture: extensive beatings, including of the soles of the feet; suspension by the wrists, feet or ankles and keeping in a twisted position and beating; burning; submersion of the head in water until partially asphyxiated; placing plastic bags soaked in petrol over the head; forced position, such as prolonged standing; sexual assaults with foreign objects and electric current; rape; forcing neck of a bottle into rectum or vagina; dental torture; simultaneous slapping of ears; and beating the penis or wedging the testicles in a drawer. The seven methods of mental torture listed are: interminable interrogation; witnessing torture of others; detention incommunicado in small dark cell; threats; sleep deprivation; being held blindfolded and incommunicado; and total sensory deprivation.

In its monthly *Situation Reports* for 1994, INFORM listed over 20 fundamental rights petitions filed in the Supreme Court during 1994 in which the petitioners alleged they had been assaulted, subjected to cruel, inhuman or degrading treatment or otherwise tortured. Almost all these allegations were against the police in the South; one case was at the Boosa Army Detention Camp. Most of these cases had yet to be decided by the end of the year.

#### **4. Disappearances**

The fate of the disappeared is by definition unknown. The disappeared are people who are believed to have been detained, but whose detention is denied by the authorities and whose whereabouts are thereafter unknown. Disappearance can involve a range of violations of human rights - including the right to recognition as a person before the law, the right to liberty and security of the person, the right to freedom from torture and the right to life.<sup>10</sup> Article 7 of the UN Declaration on the Protection of All Persons from Enforced Disappearances makes clear that the practice of disappearance can never be justified, whatever the circumstances. In Sri Lankan law, the protections against torture and arbitrary arrest and detention, the provisions regarding the right to a fair trial and those regarding the protection of prisoners and running of prisons are all relevant to the prevention of disappearances.

Acts of disappearance have been perpetrated in massive numbers in Sri Lanka. The exact numbers are hard to estimate, but are widely believed to run to tens of thousands. Starting as a pattern in 1984 in the North East, the number of disappearances soared to unprecedented thousands during the counter-insurgency campaign in the South in 1988 and 1989, and continued in the thousands in the first months of the renewed fighting in the North East from June 1990.

Although long-term disappearances have reduced in number markedly, the conditions which facilitate disappearance have

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<sup>10</sup> See Article 1(2) of the UN Declaration on the Protection of All Persons from Enforced Disappearances (adopted by the UN General Assembly in December 1992)



not been removed. Unless full preventive measures are taken swiftly, acts of disappearance could well recur if security conditions in the area alter. Unacknowledged detentions - which are a form of temporary disappearance - continued to be reported from the East, for example in both Batticaloa and Trincomalee, with arrests sometimes only being acknowledged after the prisoner had been released. As noted above, periods of unacknowledged detention are fraught with risk for the detainee, especially when the prisoner is in the custody of his or her interrogators. The enforcement of safeguards on detention in this early period is crucial if torture and disappearance are to be properly curbed.

In this regard, there is a vital need for the emergency regulations regarding arrest and detention and the PTA to be revised to incorporate proper safeguards against disappearance and torture.<sup>11</sup> Such safeguards would include the provision of minimum conditions of detention for persons held under emergency regulations and the PTA, which are not provided at present, the strengthening of the reporting requirements following an arrest or detention under the emergency regulations and the PTA; and the creation of a properly-resourced, independent body charged with the responsibility of monitoring the welfare of detainees; with full powers of access and investigation. Immediate action should be taken to investigate reports of unacknowledged detention, and those officers found responsible for breaches of procedure which could facilitate disappearances should be punished.

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<sup>11</sup> The emergency provisions for arrest and detention are described more fully in Chapter III on Emergency Rule.



In addition to measures intended to prevent future disappearances, it is also of major importance for redress to be provided to the many thousands of relatives of those who have disappeared. However, the two issues of prevention and redress are clearly interlinked. Disappearances - because of their largely clandestine nature and because, by definition, their perpetration has been officially denied - are particularly invidious violations of human rights. They must be fully investigated and the findings made public and officially acknowledged; the authorities must make clear that such acts will never be tolerated again and are also required under international human rights to bring those responsible to justice. These issues are discussed further in Chapters VI and VII on the investigation of past violations and impunity.

Two measures were taken in 1994 to provide some redress for past disappearances. The first was the passing on 25 November of the Registration of Deaths (Temporary Provisions) Act, which provides that where a person is reported missing and presumed dead or has not been heard of for over a year by those who would normally have heard from him or her, the next of kin can apply to the District Registrar of Deaths to register such person's death and issue a death certificate. The Act clearly sets out the procedures which must be followed by the District Registrar upon receiving an application. The form for registering the death of disappeared persons, which is attached to the text of the Act, is simple and uncomplicated. The creation of a workable system by which family members of disappeared persons can register the death of such persons, and thereby qualify for relief and pension payments, is clearly of great importance.

Of perhaps greater overall consequence, however, was the appointment in November 1994 of three independent Presidential Commissions of Inquiry into Involuntary Removal and Disappearances of Persons to investigate acts of disappearance committed from 1 January 1988. Their work commenced in January 1995. Each commission has a specific geographical area of inquiry: one covers Western, Southern and Sabaragamuwa Provinces; another covers Central, North Western, North Central and Uva Provinces; the third covers the Northern and Eastern Provinces. The commissions are required to report to the president on their findings within four months. One shortcoming in their mandate is that they cannot investigate disappearances which took place prior to 1988, despite the fact that *as a pattern or method of counter-insurgency*, disappearances began to be perpetrated in 1984, although a few cases were reported before that date.<sup>12</sup> The work of the commissions is discussed in more detail in Chapter VI.

The work of another commission of inquiry into disappearances continued throughout 1994. This was the Presidential Commission of Inquiry into the Involuntary Removal of Persons (PCIIRP) appointed by President Premadasa in January 1991, which was empowered only to investigate acts of disappearance perpetrated from 11 January 1991 - i.e., excluding from consideration the vast majority of disappearances, which were committed before the date of the commission's creation.<sup>13</sup> The mandate of

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<sup>12</sup> See CRM, *Commissions to Investigate "Disappearances,"* E 01/11/94, 28 November 1994

<sup>13</sup> See AI, *Sri Lanka: Time for Truth and Justice* - Observations and recommendations regarding the commissions investigating past human rights violations (AI Index: ASA 37/04/95, London, April 1995). The figures on the PCIIRP's work are drawn from this document.

this commission has been extended periodically, and is now due to expire on 22 August 1995. It will then have to submit a final report on its findings to the president.

The relationship between the three newly-appointed commissions of inquiry into disappearances and the PCIIRP does not appear to have been addressed by the government, although there are clear areas of overlap between their mandates. As the figures below show, the PCIIRP has investigated over 300 cases of disappearance already. It has also submitted to the government reports on 142 individual cases. It is to be hoped that these reports, which have not been made public, have been made available to the newly-appointed commissions of inquiry in order that there is not any unnecessary duplication of work. Details of the other cases which the PCIIRP has already investigated should also be made available to the new commissions, for the same purpose.

By February 1995, according to figures provided by the PCIIRP to AI, the commission had concluded 316 public inquiries in the four years of its existence, and investigations into 341 further disappearances were continuing. The commission had traced 175 people who had been reported as having disappeared; these cases are additional to the 316 completed public inquiries. However, approximately 100 of the 316 cases had been set aside, but not closed, because witnesses had not come to give evidence, often because they could not travel to Colombo due to the security situation in the North East. Changes to the commission's terms of reference made in August 1993, and increased co-operation from the security forces more recently, have enabled to speed up its investigations considerably. In its

first year of existence, for example, it concluded investigations into only 11 cases. The commission has submitted at least 142 reports on their findings in individual cases of disappearance to successive presidents, but not one of these has yet been made public, despite statements by the Premadasa government that it would publish the first set of reports it had received as parliamentary sessional papers.

#### 4.1 Reports of Disappearances

Disappearances have reduced in number significantly in the past couple of years. In 1994 relatively few were reported from the East. For example, two people were arrested by the STF at Thalankuda, six miles south of Batticaloa, in late February 1994. The Batticaloa Peace Committee attempted to trace them, and received a reply from the authorities some four months after the arrests suggesting that the two had been taken by unknown persons wearing yellow masks, and that they were untraceable. However, there had been witnesses to their arrest by members of the STF.

At the end of 1993, a group of five people - including a 13 year old child - disappeared after being arrested by soldiers from the Mullivedduwan Army Camp.<sup>14</sup> No receipts were issued when they were arrested. The five were working in a field at Kudavadakadu when they were arrested. The Commanders of both the Mullivedduwan Army Camp and the Pullipanjakal Army Camp denied having taken them. The Mullivedduwan Camp said they had arrested five people, but released them. However, the HRTF established that

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<sup>14</sup> HRTF, *Annual Report: 10 August 1993 - 10 August 1994*, p 22

they were referring to a different group of people who had been arrested on 29 December 1994, in respect of whom receipts had been issued. According to the HRTF, "the five persons taken into custody by soldiers of the Mullivedduwan Army Camp on 24.12.93 are missing to date and must be presumed to have been killed. A proper investigation must be initiated and the offenders brought to book."

The detention of prisoners by the LTTE often amounts to a disappearance, as the LTTE generally refuses to give information about the fate of those it has detained for political purposes. Sometimes - as in the case of Chelvi and Manoharan, who were detained by the LTTE in August 1991 - contradictory information circulates. Anton Balasingham told *Counterpoint* magazine in December 1993 that both were safe. However, other sources have indicated that they were killed. Similarly, rumours circulate that some prisoners long feared dead may in fact be alive.

No mass detentions by the LTTE were reported in 1994. There were, however, reports of abductions of youths by the LTTE as a form of forcible conscription in the latter part of the year.

## **5. Arbitrary Arrest and Detention**

Article 9 of the ICCPR protects against arbitrary arrest and detention. Under Article 4, derogations to this right are possible in times of public emergency which threaten the life of the nation, and then only to the extent strictly necessary to deal with the exigencies of the situation. Under the Constitution of Sri Lanka, freedom from arbitrary arrest is



guaranteed under Article 13(1), which specifies that people may only be deprived of their liberty by the procedure established by law, and provides to every arrested person a right to be informed of the reason for the arrest. However, Article 15(7) of the Constitution provides for far broader restrictions on this right than are permissible under the ICCPR. Restrictions can be prescribed by law in the interests of national security, public order, public health or morality. The presumption of innocence provided under Article 13(5) and the prohibition of retroactive penal legislation provided under Article 13(6) can both be restricted in the interest of national security by Article 15(1).

The right to freedom from arbitrary arrest and detention have been seriously curtailed by both the PTA and the emergency regulations. The provisions of the PTA relating to arrest and detention were given in some detail in *Sri Lanka: State of Human Rights 1993*, and so are not repeated here. The PTA contains several provisions which contravene the ICCPR and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. These include the fact that it has retroactive effect, as well as provisions regarding the conditions and periods of detention, the lack of legal safeguards on detention, the right to visits from lawyers and relatives, changes from the normal law relating to the admissibility of statements made to police officers, and shifts in the burden of proof relating to statements made under duress.

Arrest and detention procedures under the emergency regulations were changed during 1994. These changes are described in Chapter III on emergency rule. Indefinite preventive detention remains possible under Regulation 17, and although subject to new procedures there continues to



be no substantive review of the grounds for detention. Indeed, there is no requirement that people held in preventive detention be produced before a court at all during the first year of detention.<sup>15</sup> Even when produced before a magistrate at the end of that year, the magistrate's function is circumscribed.

People arrested under Regulation 18 on suspicion of having committed an offence under the regulations are subject to different provisions which apply to different areas of the country within which the emergency is in force. "Receipts" are required to be issued when a person is arrested under Regulation 18 (but there is no such requirement for persons detained under Regulation 17), which can be a useful safeguard, but the requirement for arrests to be reported to the HRTF was dropped in September 1994, which is a serious omission. Another cause of concern is that long periods of detention for investigation are still permitted in the North East (up to 60 days, as compared to seven days in the those areas of the South where the emergency is in force, and when the offence was committed outside the North East). Such detention can be in police or military custody, where the prisoner is most at risk of abuse. At the end of this period, the nature of the detention can be altered to preventive detention under Regulation 17. Otherwise, the prisoner must either be released or produced before a court. However, the court's powers are circumscribed: it *shall* order the prisoner to be remanded in prison custody, where he or

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<sup>15</sup> See Nadesan Centre legal briefing, *Arrest and Detention under the Current Emergency Regulations: a descriptive account of the provisions relating to arrest and detention under the Emergency (Miscellaneous Provisions and Powers) Regulations No. 4 of 1994 published in Gazette Extraordinary No. 843/12 of 4 November 1994* (Colombo, April 1995)

she must remain for three months. Bail may not be granted in this period without the prior written consent of the Attorney General (AG) and specified bail procedures apply thereafter. The problem of illegal and arbitrary arrests and detentions was recognised by the PA government when it took office. In September it appointed a committee of inquiry under Justice Soza to review the detainees' cases and announced that charges would be withdrawn against those held for withholding information on minor offences. Justice Minister G.L. Peiris was also reported as saying that those indicted so far on the basis of their confessions to the police under the emergency regulations would also be considered for release, as such confessions are not admissible under normal law. At that time some 800 persons were said to be held in detention.<sup>16</sup> On the basis of the committee's interim report in October, 275 people held on minor charges under the emergency regulations were released and the High Court indictments against 75 detainees were withdrawn.<sup>17</sup> When it completed its work in January 1995, the committee recommended that a further 181 detainees should be released.

### **5.1 Reports of Arbitrary Arrests and Detentions**

The number of persons held in detention at any one time may vary considerably and accurate figures are hard to determine for any particular date. The HRTF, in the period from September 1993 to July 1994, made numerous visits to detention camps, police stations, STF camps and army

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<sup>16</sup> *The Island*, 2 September 1994 and 17 September 1994

<sup>17</sup> INFORM, *Situation Report - October 1994*

camps around the country.<sup>18</sup> It recorded a total of 3,980 detainees, of whom 646 were held in camps; 2,291 held in police and STF custody; and 1,043 held in military custody.<sup>19</sup> However, these figures do not represent the actual number of detainees held at any one time, and make no allowance for the fact that some detainees are seen and registered more than once. In December 1994 the HRTF estimated the actual number of detainees held at that time to be about 500. This compares with approximately 2,000 detainees thought to be held at the end of 1993.

Lawyers have reported numerous violations of arrest and detention procedures. For example, many of those arrested are never told the reason for their arrest, and police officers often fail to make an entry at the time of arrest. People may be held in custody without formally being arrested while the police seek sufficient evidence to justify their arrest, and then make entries giving a later date and time for the arrest.

The Nadesan Centre for Human Rights through Law has pointed out that detentions made under the emergency regulations promulgated in August, September, October and November 1994 appear to have been illegal.<sup>20</sup> This is because under Regulation 17(4) detainees held under the emergency regulations may only be held in such place as the Defence Secretary authorises, a list of which must be published. A list of 81 authorised places - consisting only of police or military establishments - was published in Gazette

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<sup>18</sup> Interview with the HRTF Director, Claude Alvis

<sup>19</sup> HRTF, *Annual Report: 10 August 1993 to 10 August 1994*, Annex 9

<sup>20</sup> Nadesan Centre, *Arrest and Detention under the Current Emergency Regulations*, p 4

No. 851/7 of 26 December 1994; the notification is dated 15 December. The Nadesan Centre was unable to trace any notification issued from August, when the state of emergency was re-introduced, to 15 December. It would thus appear that during this period there were no places in which detainees could be held legally, as none had been notified.

Unacknowledged detentions continued in 1994. Of the 71 people reported missing and subsequently traced by the HRTF in the year up to August 1994, 41 had been arrested in 1994. All were subsequently found in police, STF or military custody. While some were traced within days, others were not found for weeks. The majority were held in the East, but two people were found in Grandpass Police Station and one was held by the Crime Detection Bureau (CDB), Colombo.

In the second half of 1993 and in the early part of 1994 thousands of Tamil people were arrested in Colombo for questioning, the vast majority of whom were released within days.<sup>21</sup> The scale of such operations declined in 1994, but accurate figures on such arrests in the South are not available.

One case of alleged arbitrary detention in which a fundamental rights petition was filed<sup>22</sup> involved a group of five Tamil people - including a 22 year old mother carrying her child, along with her mother - who were on their way to see their lawyer on the morning of 29 December 1994 when

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<sup>21</sup> See *Sri Lanka: State of Human Rights 1993*, p 40

<sup>22</sup> Supreme Court Application No. 11/95

they were taken into custody by a plain clothed police officer at Kirula Junction, Thimbirigasyaya, and taken to Narahenpitiya Police Station. The lawyer attempted to secure their release, but they were moved to Bambalapitiya Police Station the next day, apparently for investigation. They were then returned to Narahenpitiya Police Station, taken to the Magistrate's Court at Hulftsdorp and remanded at the request of the Officer in Charge of Narahenpitiya Police Station until 4 January 1995. In January, the magistrate released them on bail. No reasons for the arrest were given to the young woman on whose behalf the fundamental rights petition was filed.

Despite the reduction in the number of apparently arbitrary arrests, however, the continuation of such illegal practices as "hostage" arrests by the police was highlighted in one case included in the HRTF report for 1994. On 26 May 1994 officers of the Peliyagoda police went to a house in Ratmalana looking for one Sornalingam. As he was not home, his brother Parameshwaran was taken into custody as a hostage for his brother. With the assistance of the HRTF, Parameshwaran was released and Sornalingam and another person surrendered to the police. After questioning them, the police concluded there was no truth in the petition which had led to their being sought, and released them. As the HRTF commented, "Taking hostages is unfortunately a pernicious practice of the Police and must be condemned. It is an abuse of police powers."

In the North, the LTTE was reported to be continuing to hold prisoners, but there was no specific information about them. The LTTE does not grant the International Committee of the Red Cross (ICRC) access to its Tamil prisoners,

although the ICRC does have access to the police officers and soldiers held by the LTTE. In September 1994, after talks had started with the new government, the LTTE released 10 policemen. Nineteen policemen and 21 soldiers remained in LTTE custody. One was reported as saying that they had been kept in dark cells with little ventilation, and that their eyesight was affected.<sup>23</sup>

## 6. Fair Trial

Article 14 of the ICCPR provides the right to "a fair and public hearing by a competent, independent, and impartial tribunal established by law" and also provides for the presumption of innocence. Article 14(3) requires that detainees be informed promptly and in a language they understand of the nature of the charge against them; be tried without undue delay; have the opportunity to secure and communicate with counsel; have time to prepare a defence and the opportunity to cross-examine witnesses. Under Article 4, the right to a fair trial can be derogated from in times of national emergencies, but only to the extent strictly required by the exigencies of the situation. Article 15 of the ICCPR prohibits the retroactive application of criminal legislation. No derogations are permitted to this provision.

Article 106 of the Constitution of Sri Lanka provides that all court sittings should be open to the public, with certain exceptions in which the judge may exercise discretion to exclude persons not directly involved with the proceedings. Article 13(3) provides that any person charged with an offence

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<sup>23</sup> *The Island*, 4 September 1994



is entitled to be heard in person or through a lawyer, at a fair trial by a competent court. Article 13(5) contains the presumption of innocence, but also permits placing the burden of proving certain facts on the defendant. The Evidence Ordinance<sup>24</sup> provides that no confession made in police custody is admissible as evidence unless made in the presence of a magistrate.

Provisions of the emergency regulations and the PTA seriously reduce the safeguards provided by the Constitution and general criminal law. For example, both permit the use in court of confessions made to police officers while the detainee was in police custody, and without a magistrate being present.<sup>25</sup> They place on the detainee the burden of proof that such confession was obtained under duress. Despite the acknowledgment by the Minister of Justice, Constitutional Affairs and External Trade, G.L. Peiris, cited above, that such provisions violate due process standards, they have yet to be removed.

The long delays in the criminal justice system continue to mean that many people spend considerable periods of time in detention before they are tried, in violation of the right to be tried "without undue delay." As the Department of Prisons' figures show in Table 1, considerably more remandees are held in prisons than convicted prisoners. In 1993, the daily average number of convicted and unconvicted prisoners totalled 9,872, of whom 5,732 (58%) were remandees and 4,140 were convicted. In the previous four

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<sup>24</sup> No. 14 of 1895, as amended

<sup>25</sup> Greater detail on the shortcomings of the emergency regulations and the PTA are given in *Sri Lanka: State of Human Rights 1993* (Law & Society Trust, Colombo, 1994)

**TABLE 1 Daily Average of Convicted and Unconvicted Prisoners 1984 - 1993**

| Year | Daily average of convicted | Daily average of remandees | Total  | Percentage of remandees |
|------|----------------------------|----------------------------|--------|-------------------------|
| 1984 | 4,252                      | 7,441                      | 11,693 | 64.0                    |
| 1985 | 4,690                      | 6,472                      | 11,162 | 58.0                    |
| 1986 | 5,274                      | 6,177                      | 11,451 | 54.0                    |
| 1987 | 5,346                      | 6,834                      | 12,180 | 56.0                    |
| 1988 | 4,415                      | 6,175                      | 10,590 | 58.0                    |
| 1989 | 2,798                      | 5,079                      | 7,877  | 65.0                    |
| 1990 | 3,871                      | 6,222                      | 10,039 | 61.6                    |
| 1991 | 3,558                      | 5,443                      | 9,001  | 60.5                    |
| 1992 | 3,558                      | 5,604                      | 9,162  | 61.2                    |
| 1993 | 4,140                      | 5,732                      | 9,872  | 58.0                    |

Source: Department of Prisons

years, the percentage of remandees was even higher: 65% in 1989; 61.6% in 1990; 60.5% in 1991 and 61.2% in 1992. Furthermore, it is unconvicted prisoners who are subjected to extreme levels of overcrowding in prison, as Table 2 shows. Since 1991 there have consistently been over four times as many remandees in prison than the number of authorised places for them.

These figures do not include the large numbers of detainees held under the emergency regulations and the PTA without charge in police stations and army camps. Some of these prisoners spend years in detention. Lawyers report that it is not unusual for detainees held under the emergency regulations to spend from 9 to 18 months in detention before being committed to judicial custody and complain that the extension of detention orders under the PTA and the emergency regulations takes place in a routine manner at the Ministry

TABLE 2 Accommodation and Buildings 1989 - 1993

| Year | Authorised accommodation |                   | Daily average population |                   | Percentage overcrowding |                   |
|------|--------------------------|-------------------|--------------------------|-------------------|-------------------------|-------------------|
|      | Convicted                | Unconvicted Total | Convicted                | Unconvicted Total | Convicted               | Unconvicted Total |
| 1984 | 5,298                    | 1,009             | 4,252                    | 7,441             | -                       | 637.5             |
| 1985 | 5,298                    | 1,009             | 4,690                    | 6,472             | -                       | 541.4             |
| 1986 | 5,298                    | 1,009             | 5,274                    | 6,177             | -                       | 512.2             |
| 1987 | 5,298                    | 1,009             | 5,346                    | 6,834             | 0.91                    | 577.3             |
| 1988 | 5,298                    | 1,009             | 4,415                    | 6,175             | -                       | 512.0             |
| 1989 | 5,298                    | 1,009             | 2,798                    | 5,079             | -                       | 403.4             |
| 1990 | 5,298                    | 1,009             | 3,871                    | 6,222             | -                       | 616.7             |
| 1991 | 5,298                    | 1,009             | 3,558                    | 5,443             | -                       | 439.4             |
| 1992 | 5,298                    | 1,009             | 3,558                    | 5,604             | -                       | 455.4             |
| 1993 | 5,298                    | 1,009             | 4,140                    | 5,832             | -                       | 468.1             |

Source: Department of Prisons

of Defence. Detention orders do not always contain the grounds for detention, and many detainees do not have access to the order.

Many detainees are never informed of the reason for their arrest, in violation of Article 13(3) of the Constitution. Further, Sri Lankan law does not provide prisoners with the right of access to a lawyer. Lawyers have also noted that defendants cannot always prepare a full defence, as they do not necessarily have access to all the information held by the prosecution.

Most of the Jaffna peninsula is under the control of the LTTE, and the Sri Lankan legal and judicial systems no longer prevail there. A new legal system has been created in the North.<sup>26</sup> A new penal code has been drafted in Tamil, with severe penalties for crimes such as assault and rape. A new law college has been established. Judges have been recruited from former LTTE cadres. Inadequate information was available about the procedures employed to assess their fairness.

## 7. Conclusions

There is a considerable need for legal, institutional and procedural reforms to protect against violations of the right to life, liberty and fair trial, and freedom from torture, arbitrary arrest and disappearance. The law and practice - including emergency provisions and the PTA - need to be brought into line with international human rights standards and the government must demonstrate its determination to ensure that violations of human rights will not go unpunished.

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<sup>26</sup> *The Sunday Times*, 19 June 1994

## V

# The Judicial Protection of Human Rights

### 1. Judicial Decisions in Fundamental Rights and Habeas Corpus Cases

The Constitution of Sri Lanka grants exclusive jurisdiction to the Supreme Court, which sits in Colombo, to hear cases concerning the alleged infringement of constitutionally-guaranteed fundamental rights. The Supreme Court has the power to grant compensation. *Habeas corpus* petitions are filed to test the legality of a prisoner's detention. The Court can issue a writ of *habeas corpus* directing that the prisoner be produced, and can order an inquiry into the alleged imprisonment. In Sri Lanka in recent years, the *habeas corpus* procedure has been used extensively in (mostly unsuccessful) attempts to trace the disappeared. Until 1994, the Court had not found a way to respond to denials of an arrest by the authorities. In 1994, however, the Court of Appeal reached a landmark decision in a *habeas corpus* case concerning three disappeared prisoners, as discussed below.

The bulk of fundamental rights decisions in 1994 only furthered existing judicial trends without significant departures from

previous years. However, there were several important fundamental rights cases concerning police misconduct, illegal detention and the ill-treatment of detainees.

The Registrar of the Supreme Court reported that 1,818 fundamental rights cases were filed between 1989 and 1993. Of these, 898 cases - or more than half of the cases filed - related to violations of fundamental rights by an officer of the state. The trend witnessed over the last few years of requiring individuals *qua* individuals to pay part of the compensation awarded the petitioner now appears to be entrenched. M.L.D.W. Sudath Pieris, for example, was awarded Rs. 50,000 as compensation for illegal detention and ill-treatment by the police. The Supreme Court directed four policemen individually, including the Officer in Charge, to pay the compensation. M.P. Shanta Wijeratne, a trade unionist, was awarded Rs. 70,000 for illegal arrest, illegal detention, and for being denied the right to freedom of expression, peaceful assembly and association. The Supreme Court in this case ordered the state to pay Rs. 50,000 to the petitioner and two policemen were ordered to pay Rs. 10,000 each. Likewise, in *Selvakumar v. Devananda et al*, the Court ordered the state to pay Rs. 20,000 and two individual officers to pay Rs. 15,000 each to the petitioner. The amount of compensation which individuals are required to pay seemed to be increasing also.

The *Wadduwa* case stands out among other cases which were decided in the course of 1994, both for the ruling itself and for the detailed legal and historical analysis presented by Justice Amerasinghe in the judgment.<sup>1</sup> In

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<sup>1</sup> Supreme Court Application Nos. 146/92 - 155/92



February 1992, 16 people who were part of a political discussion group were arrested and detained by police during a closed meeting of the group. The police said they had been "tipped off" by an anonymous caller that a meeting of the JVP was taking place. They said that they went to the place of the meeting, listened through a window, and decided the members of the meeting were conspiring against the government, and so arrested them under the emergency regulations. The Court refused to believe the police version of events, declaring the police story incorrect as a matter of law and impossible as matter of fact. The Court found for the petitioners on charges of violations of Article 13(1) (right to freedom from arbitrary arrest), Article 13(2) (right to production before a judge after arrest), Article 14(1)(a) (right to freedom of speech and expression), and Article 14(1)(c) (right to freedom of association). In the course of the judgment, the Court made it clear that it would not entertain either fiction or ignorance, particularly on the part of police officers, with any kindness. The Court expressed dismay at the procedures followed by the police: not only were the police unaware that the JVP was no longer a proscribed group, but they were not even clear which emergency regulation justified the arrest and detention of the petitioners. The Court stated that although mere errors of form do not *per se* amount to a violation of fundamental rights under Article 13(1), they do indicate a degree of arbitrariness and a lack of diligence on the part of the arresting officers, which reflects adversely on their credibility. The Court also stated that unless an emergency regulation was absolutely clear, an abridgement of fundamental rights could not be read as an implied intention of such emergency regulation. The Court found against the petitioners on allegations of violations of Article 11

(right to freedom from torture) after a careful examination of the facts presented.

The significance of the *Wadduwa case* lies also in its consolidation of years of jurisprudence on police malpractice, illegal detention and attendant denial of free speech rights. The decision distils the history of a line of cases on each of the fundamental rights violated, and draws clear precedent for future cases from this history. It makes reference to a number of previous decisions of the Supreme Court, most of which remain unreported. Where the local history is insufficient on a point, Justice Amerasinghe draws widely on reported cases and sources from other countries, at times quoting from them at length. This is particularly marked in the discussion on freedom of speech, expression and association, where the authorities cited ranged from American cases on the First Amendment to John Stuart Mill's *On Liberty* to the Greek etymology of the concept of democracy. While drawing support from other traditions is not a new phenomenon in Sri Lankan jurisprudence, the *Wadduwa case* stands out among others because of the enormous effort made to draw on international and local sources on behalf of a given proposition.

The judicial protection of rights of those held in police custody appear to be steadily, albeit slowly, growing stronger although it is necessary to remember that an increase in judicial protection, which tends to be retroactive rather than preventive, does not in itself correlate to an increase in actual protection. The trend in the area of protecting the rights of detainees seems to stick to the letter of the law, with the letter of the law being interpreted, as in the *Wadduwa case*, with a somewhat broad stroke. Where emergency

regulations are unclear, the Constitution is relied upon as much as possible.

The right to equality also received some attention in 1994. In a series of similar cases involving disputed recruitments or promotions, the Supreme Court made clear that institutions included within the ambit of "executive or administrative" state action must be careful to abide by procedure and not only be fair, but "be seen to be fair."

In December 1994, there was a landmark decision in a *habeas corpus* case regarding three cases of disappearance. For the first time, the court confronted the long-standing issue of how it would deal with the denial of a detention by the respondents. In this case,<sup>2</sup> the Court of Appeal disbelieved the police officer's denial that three young men had been detained. Drawing on an important Indian precedent, the court awarded exemplary damages of Rs. 100,000 to the petitioners, who were the victims' mothers, to be paid by the Officer in Charge of Dikwella Police Station. The victims had been arrested in December 1988. Importantly, the Court also ordered the Inspector General of Police to consider the evidence recorded in the case "as information of the commission of cognizable offences," and to conduct proper investigations and take steps according to law.

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<sup>2</sup> *K. Leeda Violet et al v. I.P. Vidanapathirana et al*, CA 164/89, 171/89, 166/89, decided on 2 December 1994

## **VI**

# **The Investigation of past Violations**

### **1. Introduction**

In its manifesto for the parliamentary elections, the PA promised that it would investigate "murders, disappearances, unresolved crimes and political victimisation which occurred in the recent past" and that "within three months of coming into power we will take immediate steps to provide to families information about the disappeared." Although such a time-frame was undoubtedly unrealistic given the sheer volume of cases needing to be investigated, this commitment to investigating past violations of human rights marked a significant shift in policy. The UNP government had repeatedly assured the international community, at fora such as the UNHRC, that it was investigating reports of certain violations. However, these investigations rarely got very far; and in the few cases when they did, action against the perpetrators rarely reached a satisfactory conclusion, as discussed in Chapter VII on impunity. Indeed, the UNP government appeared to have tried to draw a line across the past: the commission of inquiry into disappearances which it appointed in January 1991, for example, was only mandated to investigate

disappearances which were committed after the date of the commission's creation.<sup>1</sup> The tens of thousands of disappearances believed to have been committed before that date remained beyond official scrutiny, for the most part.

In practice, after it came to power, the PA government appeared to retreat to some extent from its initial commitments. Although it took the very important step of creating three commissions of inquiry into disappearances committed from 1 January 1988, which are discussed below, it appeared to be reluctant to ensure the use of all available techniques of investigation. In particular, it seemed reluctant to draw upon the forensic expertise that is available internationally to assist in investigations in Sri Lanka, and has retreated from the initial lead it gave in sanctioning the excavation and investigation of mass graves thought to contain the remains of the disappeared.

There is a clear obligation under international human rights law for disappearances and extrajudicial killings to be investigated. Investigation can serve many different purposes: it can expose and officially acknowledge a record of the past both as a form of reparation for victims and in order that lessons may be learnt from that experience. Investigation can also help affirm a political transition and changes in human rights policy and practice. By exposing the practices involved in past violations, investigation can assist in the development of new policies and practices designed to prevent repetition of such crimes. Investigation is also crucial as a means of providing some redress for relatives: surviving

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<sup>1</sup> This was the Presidential Commission of Inquiry into Involuntary Removals, the work of which is discussed further in Chapter VII.

victims and relatives of the disappeared are entitled to a full explanation of what happened.<sup>2</sup> In addition, investigation is also a crucial element in the process of bringing perpetrators of human rights violations to justice, which is discussed in Chapter VII.

There are several international instruments which contain standards on the investigation of disappearances and extrajudicial killings, including the UN Principles on Extra-Legal, Arbitrary and Summary Executions and the Declaration on Disappearances. The UN has also published a useful *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*.

Investigating bodies should have certain key characteristics. They should be independent of those allegedly responsible for the crimes; they should have the necessary powers and resources to conduct their investigations fully; their members and staff should be professionally competent for their tasks; they should be protected against intimidation and reprisals, as should the witnesses who testify. The investigation should be impartial, effective, prompt and use methods which have been made known to the public in advance. The report of the investigation should be made public as soon as it is ready and the government should make known the action it intends to take as a result of the report.<sup>3</sup>

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<sup>2</sup> See Hayner, P.B., "Fifteen Truth Commissions - 1974 to 1984: A Comparative Study" in *Human Rights Quarterly* 16 (1994) pp 597-655; and Article 19, *An Agenda for Change: The Right to Freedom of Expression in Sri Lanka* (London, October 1994) pp 46-52

<sup>3</sup> See AI, "Disappearances" and Political Killings - *Human Rights Crisis of the 1990s: A manual for action* (Amsterdam, 1994) pp 142 -146, for more on these points.



## **2. The Excavation of Mass Graves at Suriyakanda and Elsewhere**

Early in 1994, on 3 January, several mass graves were discovered at Suriyakanda in the Embilipitiya area. They were believed to contain the remains of some 300 people who had disappeared in custody in the area from 1989 to 1990. The excavation of these graves began on the initiative of the SLFP, which was then in opposition. Indeed, Chandrika Bandaranaike Kumaratunga, who was then the Chief Minister of the Western Provincial Council, was among those present to witness the opening of the graves. Once skeletal remains had been found, an SLFP member of parliament and two lawyers informed the Embilipitiya Magistrate of the discovery, and the magistrate ordered that further exhumations be carried out. The opening of these graves received considerable press coverage at first, but within two days, news of the excavations stopped being carried in the city editions of the main national newspapers. On 5 January 1994 the SLFP issued a statement calling on the government to appoint an independent commission to investigate these mass graves and to bring those responsible for the killings to justice.<sup>4</sup> The excavation of the Suriyakanda graves became a highly politicised issue and was conducted in a rather haphazard manner. Some of those involved in exposing the graves received threatening telephone calls, and the lawyer who had reported the existence of the graves to the magistrate was shot at on 10 January while returning home from a hearing on this case.

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<sup>4</sup> The SLFP statement is published in *INFORM, Special Dossier on Mass Graves at Suriyakanda*.

Local and international human rights organisations were concerned that unless proper forensic techniques were employed for this excavation, much valuable evidence would be lost. They called upon the UNP government to ensure that the graves would be excavated using methods consistent with UN guidelines on the disinterment and analysis of skeletal remains, which are contained within the *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*. Some organisations circulated these standards to the parties involved in the excavations, both in government and opposition. They also suggested that the government could request assistance under UN auspices from internationally recognised forensic experts with considerable experience in the excavation of graves of this type. Such a request to the UN would have implemented a recommendation made earlier by the UN Working Group on Enforced and Involuntary Disappearances to the Government of Sri Lanka, and which the government had said in February 1992 that it had accepted but had never implemented. However, the government requested no such assistance and further excavations at Suriyakanda were stopped. Although some remains from these graves had been passed to the Judicial Medical Officer in Colombo for examination, little progress was reported on the forensic examination.

Excavation of the Suriyakanda graves only resumed after the PA had won the parliamentary elections and taken office. In September 1994, following an application for further investigations made by the AG to the Magistrate, four sites at Suriyakanda were further investigated but only a few remains were recovered.<sup>5</sup> Local and international human

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<sup>5</sup> INFORM, *Situation Report - September 1994*

rights groups again urged the government to enlist the services of forensic specialists with experience in such cases in other countries, in order to ensure that as much evidence as possible could be gleaned from the sites, but the government did not do so. Despite the fact that the excavation was resumed at the request of the government, some sections of the government soon started to distance themselves from it.

In the months after the PA government came to power, when there appeared to be official sanction for investigations of this kind, several more mass graves came to light in different parts of the country containing the remains of people thought to have disappeared between 1988 and 1990. Some 20 such graves have been excavated, including at Wariyapola, Kitulgolla, Hokandara, Veyangoda, Rakwana and Akmeemana. Many more such graves are believed to exist around the country, including in the North East.

These excavations were initiated in response to individuals, often relatives of the disappeared, making complaints to local magistrates about the existence of graves which they believed might contain the remains of their family members. They may have known about these sites for a long time previously, but been too frightened to come forward before. These cases continued to be investigated in a haphazard manner, adding to the concern of local and international human rights organisations and forensic experts, who continued to urge the government to ensure that they be conducted in keeping with UN standards on investigation, so that valuable evidence would not be lost. In such cases, it is the government medical officers - who are not experts in forensic anthropology

- who are responsible for gathering evidence at the site of the excavations, often assisted by the police.<sup>6</sup>

Despite the fact that it had been the government itself which had requested the Suriyakanda excavations to be resumed in September 1994, only one month later the Minister of Justice, Constitutional Affairs and External Trade was making statements apparently intended to distance the government from the excavations taking place around the country. On 12 October 1994 he was reported as saying: "If a person claims to have knowledge of the body or bones of a person killed being buried somewhere such a person can make a statement to a Court and if the Court is satisfied it starts an inquiry into this. It's not the government or the Justice Ministry which does this. Neither can the government initiate proceedings or bring them to an end." Such statements provoked concern in the human rights community that the government's commitment to the full investigation of past violations may be waning.

Rather than leaving such exhumations and investigations to be carried out in an *ad hoc* manner, with no co-ordination or consistency, it would be better for them to be brought under the auspices of the commissions of inquiry into disappearances which the PA government established in November 1994. This would help ensure that all possible evidence potentially pertaining to disappearances can be gathered by the commissions, and that exhumations and the analysis of skeletal remains are carried out in line with

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<sup>6</sup> AI, *Sri Lanka: Time for Truth and Justice - Observations and recommendations regarding the commissions investigating past human rights violations* (AI Index: ASA 37/04/95, London, April 1995)

UN guidelines. The commissions themselves could call for the necessary expertise to conduct these investigations, including where necessary from the international community. As described below, the organisation, Physicians for Human Rights has already offered the government its services to assist in forensic investigations of this kind. In its report *Sri Lanka: Time for Truth and Justice*, AI urged the government to consider creating a procedure which would allow the commissions to supervise the analysis of skeletal remains of people who may have disappeared.

In October 1994, Dr. Clyde Collins Snow paid a preliminary visit to Sri Lanka at the invitation of (then) Prime Minister Chandrika Bandaranaike Kumaratunga. Dr. Snow is a forensic expert of international repute, with considerable experience in the excavation of mass graves in various countries. On the basis of his visit, he recommended to the government that the development of a team of independent forensic experts in Sri Lanka, who would serve the established medico-legal system, would be an effective way to gather evidence from individual and mass graves which would be admissible in court. Such a team would be on call when a local magistrate, through the Judicial Medical Officer, requested its assistance in investigations. Teams of this type have been established in Guatemala, Argentina and Chile, and consist of specialists in forensic anthropology with expertise in the excavation of mass graves and the determination from skeletal evidence of the identity of the victims. Physicians for Human Rights offered to assist in the recruitment and training of such a forensic anthropology team in Sri Lanka. It also offered in the interim - until a Sri Lankan team had been developed - to provide its own forensic experts, to work alongside Sri Lankan colleagues, to assist in any



individual cases that might come under investigation. It is to be hoped that the government will respond positively to these proposals in order that Sri Lankan expertise on these subjects can be developed and used to best effect.

### 3. The Three Commissions of Inquiry into Disappearances

After taking office in August 1994, the PA government said it would appoint three commissions of inquiry into disappearances which had been committed since 1 January 1988. The appointment of these commissions was delayed, however, apparently because the then President, Dingiri Banda Wijetunga of the UNP, would not sign the warrants. In late November 1994, after the PA's overwhelming victory in the presidential elections, the commissions were appointed. They started their work in January 1995.

Each of the three commissions covers a different geographical area. One is mandated to investigate disappearances in Western, Southern, and Sabaragamuwa Provinces; another covers Central, North Western, North Central, and Uva Provinces; the third covers the Northern and Eastern Provinces. The commissions are each mandated to inquire into and report on:

- \* *whether any persons have been involuntarily removed or have disappeared from their places of residence in [the provinces allocated to the respective commission] at any time after 1 January 1988;*
- \* *the evidence available to establish such alleged removals or disappearances;*



- \* *the present whereabouts of the persons alleged to have been so removed; or to have so disappeared;*
- \* *whether there is any credible material indicative of the person or persons responsible for the alleged removals or `disappearances;*
- \* *the legal proceedings that can be taken against the persons held to be so responsible;*
- \* *the measures necessary to prevent the occurrence of such alleged activities in the future;*
- \* *the relief, if any, that should be afforded to the parents, spouses and dependents of the persons alleged to have been so removed or to have so disappeared.<sup>7</sup>*

The commissions were given four months to submit their reports to the president setting out their findings and recommendations. By early March 1995 each commission was said to have received around 10,000 complaints of disappearances. The commissions would clearly be unable to complete their task within four months, but no problems about an extension of their mandate were anticipated.

As the commissions only began their work in January 1995, no assessment of their work so far can be made. It should be noted, however, that the commissions do not appear to be pursuing the possibility of employing forensic anthropological methods to excavate graves and analyse skeletal remains, despite the light such methods can throw on the fate and whereabouts of persons who have disappeared.

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<sup>7</sup> Quoted from the notices published by the commissions in the national newspapers on 15 January 1995, and reproduced in AI, *Sri Lanka: Time for Truth and Justice*

Several concerns have been expressed by human rights organisations about aspects of the commissions' mandate. First, the government has not given reasons for the exclusion from these investigations of disappearances which were committed prior to 1988. While the rate at which disappearances were committed undoubtedly soared in the years from 1988 to 1990, they began to be committed as a pattern in 1984 in the context of the armed conflict in the North East between government forces and Tamil separatist groups. From 1984 to mid-1987 AI documented over 680 disappearances in the custody of the security forces in the North East. In 1987 as a whole it recorded 134 cases, 12 of which were committed in the South.<sup>8</sup> A few isolated cases of disappearance were reported in previous years. All these cases from before 1 January 1988 also warrant full and impartial investigation.

A second question concerns the division of the country between three separate commissions of inquiry. The government has not made known why it chose to constitute three separate commissions. If a geographical focus was considered necessary for some reason, one commission could have been created with regional sub-commissions all working under one authority. This would have ensured consistency of method and would have enabled the findings of all the sub-commissions to be considered as a whole. Such an island-wide overview might enable a greater understanding of the overall patterns of abuse over time and space to be developed. It might also reveal underlying political, institutional, structural or policy factors which would not emerge in the context of investigating a single region. It would also ensure that

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<sup>8</sup> AI, *Sri Lanka: Time for Truth and Justice*, p 9

a unified and consistent set of recommendations would be prepared drawing on the combined findings of the various regional investigations.

Another area of concern is that the commissions have not received adequate resources to enable them to work effectively. According to AI,<sup>9</sup> they have not been given control over their own budgets but had to rely on the Presidential Secretariat for funds for their routine work. The sheer volume of work before them, and the practical and political difficulties involved in investigations of this kind, demand that better resources must be provided if the commissions are to prove effective. They need adequate material and human resources for their work.

Also of concern is the overlap in the mandate of these new commissions of inquiry and that of the commission of inquiry into disappearances established in January 1991 by the UNP government. The latter commission has already completed investigations into several hundred disappearances committed after January 1991,<sup>10</sup> which could now also come under the purview of the newly-established commissions. Co-ordination between these bodies is thus necessary to ensure that there is no unnecessary duplication of effort.

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<sup>9</sup> *Sri Lanka: Time for Truth and Justice*

<sup>10</sup> The work of this commission is discussed more fully in Chapter VII.

## VII

### Impunity

#### 1. Introduction

That a climate of impunity has long prevailed in Sri Lanka was acknowledged by the previous government for several years.<sup>1</sup> Although it repeatedly promised that it was taking steps to address the issue and prosecute perpetrators, very few investigations into violations were held, very few cases went to trial, and those that did reach the courts have for the most part failed to reach satisfactory conclusions. The persistent refusal of the UNP government to investigate properly the vast majority of the massive violations of human rights committed during its term of office constitutes a most serious violation of human rights in itself. Governments which fail to investigate gross human rights violations such as disappearances, summary and arbitrary executions and torture, and to bring to justice those who are found responsible, are in breach of international human rights standards, such

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<sup>1</sup> For example, at successive annual meetings of the UN Human Rights Commission in Geneva. In March 1994 the government said in a statement made at the Commission that "As a commitment to the promotion of accountability through pursuit of legal mechanisms, effective steps will be taken to prosecute human rights violators by undertaking vigorous investigations and the institution of prosecutions in court."

as the UN Declaration on the Protection of All Persons from Enforced Disappearance, the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions and the UN Torture Convention.

The obligation to investigate violations and bring the perpetrators to justice is not based upon a spirit of revenge. It is, rather, seen as a means to provide redress for the past; to expose and to acknowledge officially the gravity of what has happened; and - by ensuring that impunity is not allowed to prevail - to try to ensure that such acts will never be repeated. As the UN Working Group on Enforced or Involuntary Disappearances said, "Perpetrators of human rights violations ... become all the more irresponsible if they are not held to account before a court of law."<sup>2</sup> Legal action in these cases, as in any others, must be conducted in full conformity with international standards for fair trial, with no curtailment of the rights of the accused.

As summarised by AI, the term "impunity,"

*conveys a sense of wrongdoers escaping justice or any serious form of accountability for their deeds. Impunity can arise at any stage before, during or after the judicial process: in not investigating the crimes; in not bringing the suspected culprits to trial; in not reaching a verdict or convicting them, despite the existence of convincing evidence which would establish their guilt beyond a reasonable doubt; in not*

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<sup>2</sup> Report to the 47th session of the UN Commission on Human Rights, E/CN.4/1991/20, p 85

*sentencing those convicted, or sentencing them to derisory punishments out of all proportion to the gravity of their crimes; in not enforcing sentences.*<sup>3</sup>

The scale of gross and systematic human rights violations committed in Sri Lanka in recent years has been horrifying. At the time they committed these acts, the perpetrators must have believed that they would never be called to account. Without the belief that their actions were condoned and that impunity would be allowed to prevail - even for the most gross violations such as the mutilation, rape, torture and killing of defenceless prisoners - it is hard to believe that such widespread and systematic violations of human rights could have taken place. That is why it is so important now to demonstrate that impunity does not last for ever. Then, should the situation ever arise again where members of the security forces or other groups acting for the authorities are encouraged, or feel free, to commit acts of this kind, they may not again feel secure in the belief that impunity can be guaranteed; they will know that their actions may one day be investigated, and that they themselves may one day be held accountable.

The PA government has undertaken to investigate at least some of the violations committed in the recent past by establishing three commissions of inquiry into disappearances perpetrated since 1988. This is a most important first step. The mandate of these commissions is discussed in Chapter VI. However, the government has given contradictory

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<sup>3</sup> AI, "Disappearances" and Political Killings - Human Rights Crisis of the 1990s: A manual for action, (Amsterdam, 1994) p 158



statements on whether or not it intends to prosecute the perpetrators of these and other gross violations. For example, the Minister of Justice, Constitutional Affairs and External Trade, G.L. Peiris was quoted as saying that,

*[t]he government owes a duty to the parents and kith and kin to help them to ascertain the fate of their loved ones and offer some compensatory relief to lighten their misery... [but] it is not possible for us to embark on a futile and impossible task of apportioning blame.<sup>4</sup>*

However, only two days later, in an interview with the British Broadcasting Corporation (BBC), President Chandrika Bandaranaike Kumaratunga expressed the opposite point of view in the following exchange:

Question: *Over the last few weeks there has been a spate of exhumations from mass graves from the time of the JVP uprising five years ago. Do you think it's a good idea to rake up the past in that way?*

Answer: *Quite definitely yes. Because all civilised societies use punishment as the major method of prevention. And I think this kind of horrendous happenings have to be exposed*

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<sup>4</sup> *Daily News*, 15 October 1994 and quoted in AI, *Sri Lanka: Time for Truth and Justice: Observations and recommendations regarding the commissions investigating past human rights violations* (AI Index: ASA 37/04/95, April 1995)

*even if we have to exhume, every one of them should be investigated, the culprits should be found if possible, and punished.*

There is no doubt that considerable practical difficulties and constraints may arise in the course of attempting to break the prevailing climate of impunity for violations committed both in the course of the anti-JVP counter-insurgency in the South, and during the conflict in the North East. The exchanges in the national press on the issue of investigation and prosecution for past violations made clear the strength of feeling on both sides of the debate. Nonetheless, the obligation to investigate fully and to prosecute where there is sufficient evidence to do so is clear. The dangers of failing to address this issue for the future protection of human rights in Sri Lanka are also clear.

## 2. Sources of Impunity

Impunity stems from various sources, some legal and some practical, and all of which must be addressed if it is to be broken. The safeguards against such violations as disappearance, torture and illegal killings have been severely undermined by the fact that Sri Lanka has been governed under an almost continuous state of emergency since 1983, and that the emergency regulations have at times contained provisions which clearly facilitate such violations, as does the PTA. Proper constitutional safeguards are necessary to ensure that such regulations, which contravene international human rights standards, cannot be introduced again. Regulations contributing to impunity which remain in force need to be removed or revised forthwith, as does the PTA.

Perhaps the clearest example of an emergency regulation which contributed to impunity was the notorious Regulation 55FF, in force at various times and under different numbers, which permitted members of the security forces to dispose of bodies without any post-mortem or inquest. The impunity granted by such regulations at the time they were in force cannot easily be overcome. The physical evidence of the killings was destroyed within the framework provided by emergency law; and in addition the very introduction of such a regulation signalled to the security forces that the political authorities would condone such actions. Even now, the emergency regulations contain post-mortem and inquest provisions which could be used to cover up illegal killings, as described in Chapter III on emergency rule.

Article 26 of the PTA also contributes to impunity by specifying that no civil or criminal action may be brought against any officer or person for any act done in good faith in pursuance or supposed pursuance of any order or direction made under the Act.

The Indemnity (Amendment) Act also remains in force, and grants immunity from prosecution to an act done or purported to be done "in good faith" by a minister, deputy minister or any public servant "whether legal or otherwise" for the purpose of restoring law and order. This applies to the period from 1 August 1977 to 16 December 1988. Thus, if any person was prosecuted for a disappearance or illegal killing committed in this period, they could attempt to invoke the defence that their acts had been committed "in good faith," as provided under the Act.

### 3. Cases Exemplifying Impunity

The fact that impunity for human rights violations has been allowed to prevail for many years in Sri Lanka, and that it can be created by many means, was emphasised by AI in its July 1994 publication.<sup>5</sup> In this report, 18 selected cases<sup>6</sup> of extrajudicial execution and disappearance were highlighted, dating from 1983 and covering both the North East and the South, and each case was used to illustrate different points about the lack of proper investigation and prosecution procedures. Although the majority of disappearances and killings have not been investigated at all, in the majority of these cases, some form of investigation had been held, and some had been taken to court. However,

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<sup>5</sup> AI, *Sri Lanka: When will justice be done?* (AI Index: ASA 37/15/94, July 1994). See also *Sri Lanka: Time for Truth and Justice*, supra n 4

<sup>6</sup> These were the killing of 53 Tamil political prisoners in Welikada prison, Colombo in July 1983; the disappearance of 23 young men from Naipattimunai, Amparai in May 1985; the death in custody of lawyer Wijedasa Liyanarachchi in September 1988; the abduction and killing of three young men from Ratnapura town in October 1988; "Black Cats" killings at Eppawala, Anuradhapura in March 1989; reprisal killings at Menikhinna, Kundasala, Arangala and Mahawatte, Kandy in September 1989; the killing of lawyer Sanath Karalliyada at Teldeniya, Kandy in October 1989 and others involved in the inquiry into the death of Jayantha Bandara, shot by police in June 1989; the disappearance of 32 schoolboys and others from the Sevana Army Camp, Embilipitiya between late 1989 and early 1990; the abduction and killing of journalist Richard de Zoysa in February 1990; the abduction and killing of 12 villagers at Wavulkele, Gampaha in February 1990; the rape and killing of W. Chandrawathie of Eppawala, Anuradhapura in September 1990; the mass graves discovered at Suriyakande, Ratnapura in January 1994; the disappearance of 159 refugees from Eastern University Refugee Camp in September 1990; the disappearance of over 160 villagers from Saturukondan, Pannichaiyadi, Pillaiyaradi and Kokkuvil, Batticaloa in September 1990; reprisal killings at Kokadichchola in June 1991; the deliberate killing of Muslim and Tamil villagers in Polonnaruwa in April 1992; the reprisal killings of 39 villagers at Mailanthanai, Batticaloa in August 1992; and the disappearance of 16 farmers at Vannathi Aru, Batticaloa in February 1993.

justice had not yet been done. Various practical sources of impunity were identified. Some of the investigations appeared to have been set up to stem public outcry about an incident rather than with any serious investigative intent, and no known results were produced. In others, despite the recording of evidence from witnesses, there was no action taken against the alleged perpetrators. In others, witnesses and lawyers were killed or threatened when a case reached the courts, or there have been lengthy delays in bringing the suspects to trial.

When there was an independent investigation, as when a presidential commission of inquiry was appointed to investigate the Kokkadichcholai killings, the terms of reference limited the scope of the inquiry, and the commissioners failed to use the full extent of their powers, thus failing to obtain all the information necessary to the inquiry. The prosecution of 20 suspects before a military court resulted in 19 being acquitted, and the Officer in Charge being convicted on the lesser charges of failing to control his troops and disposing of bodies illegally. No full investigation has yet been held into this case.

A few other cases - such as the Mailanthanai killings - are being tried by normal criminal procedure. In this case, non-summary proceedings commenced in April 1993 at the Batticaloa Magistrate's Court against 24 soldiers implicated in these killings. After two hearings, the inquiry was transferred to Polonnaruwa Magistrate's Court at the request of the AG, but with no reasons for the transfer given. This created great difficulties for the witnesses to attend since they were all displaced people living at Valaichenai camp. An application was filed in the Court of Appeal

in October 1993 to have the non-summary inquiry transferred back to Batticaloa, but was dismissed as being misconceived in law. The inquiry was finally completed on 8 March 1994, and concluded with 21 of the 24 soldiers being committed for trial at the High Court on charges of murdering 35 people. Three soldiers were discharged. The trial was pending at the end of 1994.

The results of several investigations into disappearances and killings in which the alleged perpetrators have been named have been reported to the government by official bodies in recent years. Yet in most cases no known action has been taken against the alleged perpetrators. The Presidential Commission of Inquiry into Involuntary Removal of Persons (PCIIRP)<sup>7</sup> had submitted reports on at least 142 cases of disappearance to successive presidents between January 1991 and the end of 1994. In some of these cases at least, the reports are believed to contain evidence implicating individual officers in perpetrating disappearances. No prosecutions are known to have resulted from these findings. The HRTF, in its annual reports, has highlighted certain cases of mass disappearances and named those believed to have been responsible. Again, in these cases too - the Embilipitiya schoolboys and the mass disappearances at Eastern University - no action had been taken up to the time the report was written. With regard to the disappearances at Eastern University, the Chairman of the HRTF commented: "The perpetrators of this dastardly crime have been identified and named by me in my previous report and although credible evidence is available no inquiry

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<sup>7</sup> See the section on disappearances in Chapter IV on the integrity of the person



whatsoever has been initiated into this incident where as many as 158 persons were arrested and have disappeared and must be presumed to have been killed extra-judicially.”<sup>8</sup>

The case of the Embilipitiya disappearances, however, received new impetus after the PA government came to power. The HRTF Chairman had repeatedly complained of unnecessary delays and unconvincing excuses being made by the AG about why the case had not been brought to trial. However, after the change of government charges were brought against nine persons - eight soldiers and one school principal - implicated in causing these disappearances. The proceedings are due to start in September 1995, with the delay being at the request of the defence.

Another case which had been pending for years concerned the killings in October 1988 of three university students in Ratnapura after they had been abducted. On 14 September 1994 the Colombo Magistrate's Court committed Ratnapura district member of parliament Susantha Punchinilame to stand trial before the High Court of Colombo in connection with these kidnappings and murders. Ten other accused were acquitted.<sup>9</sup>

Another long-standing case - dating from 1983 - was resolved out of court in 1994. The UNP government finally settled a civil action for compensation which had been brought by relatives of those killed in Welikada prison during the riots of July 1983.

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<sup>8</sup> HRTF, *Annual Report: 10 August 1993 - 10 August 1994*, pp 14-15

<sup>9</sup> INFORM, *Situation Report - September 1994*, Colombo

#### 4. Overcoming Impunity

Once the various sources of impunity have been identified, they need to be dealt with effectively. Legal provisions which afford impunity should be repealed, and any future provisions should be opposed. Pardons should not be granted before full and open judicial proceedings have been held and criminal responsibility established. The actions and practices which give rise to practical impunity also need to be overcome.

If perpetrators are to be brought to justice in a fair manner, the judicial process itself should be prompt, impartial, effective, fair to the accused and open. There should be no statute of limitations on prosecutions for disappearances or extrajudicial killings; there should be no defence of superior orders; and the superior authorities behind the crimes - the people who planned, ordered and helped organise them - should also be held liable.<sup>10</sup> Once a verdict of guilt is reached, if the punishments imposed do not correspond to the gravity of the offence committed, then another source of practical impunity is created.

Once responsibility for disappearances and extrajudicial killings is established, redress should be provided to those victims who survive or to their relatives. This may take the form of financial compensation, rehabilitation or restitution. The bringing to light of the events of the past, and the official acknowledgement of responsibility, is another important form of redress.

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<sup>10</sup> See AI, *"Disappearances" and Political Killings*, Chapter 11, where these points, which are drawn from international human rights standards, are elaborated

## **VIII**

# **Freedom of Expression and the Media**

### **1. Introduction .**

Both in its campaigning before the parliamentary elections of August 1994 and in public statements in the following months, the PA undertook to end the pervasive censorship which has long plagued the Sri Lankan media and to restore media freedom. In the first months after the new PA government took office, there was a greater sense of freedom in the media. A wider range of issues and viewpoints were given coverage, and the culture of "self-censorship" - which had developed in response to the harassment and intimidation which media personnel had experienced in earlier years - appeared to be declining. A new media policy was approved by the cabinet in October. It promised considerable legal and institutional reform, and four committees were established to make recommendations for the implementation of this policy. However, as the November presidential election approached, the government began to exercise greater control over the state-owned media, particularly. Following the assassination of the UNP presidential candidate, Gamini Dissanayake, and more than 55 others just two weeks before the election, there were numerous reports of government interference in the media.

Both the parliamentary election campaign in August 1994, which was held under the UNP government, and the presidential election campaign in November 1994, which was held under the PA government, were marred by the partiality of the state-owned media and by reports of governmental interference in the media. Reports of censorship did not stop after the election was over, and continued into 1995.

## 2. International Standards

Article 19 of the ICCPR guarantees the right to freedom of opinion, expression and information. Paragraph 2 of Article 19 protects the following:

*freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media...*

These rights may be subjected to certain restrictions under the specific circumstances described in paragraph 3 of Article 19. Such restrictions must be provided by law and must be "necessary" for the respect of the rights or reputations of others, for the protection of national security or of public order (*ordre public*), or of public health or morals.

Derogations from these rights are permitted under Article 4 of the ICCPR, but only in exceptional circumstances which "threaten the life of the nation." Any such restrictions must be only "to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law."

### 3. Constitutional Guarantees

Article 14 of the Sri Lankan Constitution protects, *inter alia*, the rights of citizens to freedom of speech and expression, including publication. However, these rights can be restricted by law on considerably broader grounds than are permitted under the ICCPR. They can be restricted "in the interests of" national security, public order, the protection of public health or morality, and a number of other matters, including in relation to parliamentary privilege, contempt of court and defamation. Furthermore, the constitutional protection of freedom of expression extends only to "citizens," in violation of Article 2(1) of the ICCPR, which specifies that the rights set forth in the ICCPR should be guaranteed to all persons within a government's jurisdiction "without distinction of any kind."

The Constitution provides no guarantee of freedom of information. However, the Supreme Court has interpreted the right to freedom of publication to include the right to receive information,<sup>1</sup> although this right receives no explicit recognition in current Sri Lankan law.

### 4. Emergency Powers

Under a state of emergency the powers of censorship available to the president far exceed those envisaged under the ICCPR. These powers have been used to impose great limitations on media freedom over the years. Some emergency provisions

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<sup>1</sup> *Visvalingam v. Liyanage* [1984] 2 Sri L R 132

which infringed on freedom of expression were removed from the regulations when they were revised by the UNP government in February and June 1993. However, the regulation on incitement was reintroduced in December 1993 and subsequently amended in January 1994; it remained in force until the state of emergency lapsed in July 1994.<sup>2</sup>

Until the Constitution is amended to provide strict limitations on the restrictions which can be imposed on freedom of expression, in line with the ICCPR, there is nothing to prevent broad restrictions again being introduced under emergency regulations.

## **5. Other Laws Affecting Freedom of Expression**

Several laws remained in force in 1994 which permitted restrictions on freedom of expression which are broader than the restrictions permitted under the ICCPR. These include:

- \* the Official Secrets Act
- \* Section 16 of the Press Council Law, concerning the unauthorised publication of matters such as cabinet decisions, proceedings and documents
- \* Section 118 of the Penal Code, concerning bringing the Queen/President into contempt
- \* Section 120 of the Penal Code, which provides a very broad definition of "sedition"
- \* Section 479 of the Penal Code, concerning criminal defamation

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<sup>2</sup> See Chapter III on Emergency Rule



- \* the four amendments to the Parliament (Powers and Privileges) Act of 1953, concerning defamatory statements reflecting on the House or concerning a member in respect of his conduct as a member

In addition, the PTA remains in force. The PTA contains many provisions which violate fundamental human rights, including freedom of expression.<sup>3</sup> None of these laws had been amended by the end of the year.

## 6. The Press

The number of newspapers in print in 1994 was 28. Of these, 14 were in Sinhala and seven in Tamil, while seven were in English. Four English papers were weeklies, and there were three English news magazines. The Sinhala "alternate" press remained vibrant. In addition to the nine national newspapers (of which five were weeklies) there were five popular tabloids and many other weeklies. In Tamil, there were two daily and two weekly papers in the South. Regional newspapers remained scarce; the provincial editions of national dailies have had to suffice. The exception is the North, where three Tamil newspapers and an English weekly news summary were run by the LTTE.

In the face of a highly specialised and diverse entertainment-oriented Sinhala magazine industry numbering over 50 publications, magazines exclusively devoted to news of current social issues have not proved popular. The "alternate,"

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<sup>3</sup> See Article 19, *An Agenda for Change: The Right to Freedom of Expression in Sri Lanka* (London, October 1994)

or "tabloid," press has proven popular, however, at least in the cities.

## **7. The Electronic Media**

There were six television channels of which four were privately owned and operated. Both of the largest television networks - Sri Lanka Rupavahini Corporation (SLRC) and the Independent Television Network (ITN) - are state-controlled. The independent programming of both TELSHAN and ETV increased in scope after the PA government assumed office, though their mainstay remained foreign programmes. MTV was almost entirely apolitical in its coverage. On balance, the state-run network remained dominant and reached a wider audience than the other channels.

The Sri Lanka Broadcasting Corporation (SLBC) monopolised radio broadcasting until 1994, when a private Sinhala and a private English channel opened. Both channels were dedicated primarily to entertainment.

## **8. The PA Government's Media Policy and Reports of Censorship in 1994**

The period up to August 1994, when the UNP remained in power, was marked by clear control by the state over the media, particularly in the run-up to the parliamentary elections in August. The UNP used the state-owned media - particularly the national newspapers and SLRC - to conduct its election campaign. State television news coverage as well as general information programming in this period

served as thinly-disguised election propaganda for the UNP, while the opposition parties were restricted in their airtime to the statutory election broadcasts. Independent newspapers and journals were harassed and intimidated. A journalist caucus working in support of the PA was threatened at a public meeting by a member of the Special Task Force.

After the change of government, a sense of greater freedom became evident in media reporting. The PA government had come to power on a platform which promised media freedom, and had included a statement on media policy in its election manifesto. In November, the cabinet approved a new media policy, which promised to free "the existing media" from government or political control; to create new institutions to guarantee media freedom; and to raise the quality and standards of both print and electronic media. The policy promised that "a new democratic media culture" would be promoted and pledged "an end to the abhorrent practice of intimidating and assaulting journalists directly or indirectly by state agencies or others, in response to carrying out their professional duties." The policy statement listed several specific measures which the government would take to ensure media freedom, but these contained no reference at all to the electronic media, so no indication was given of how these media institutions would be freed from governmental control. The measures included "broadbasing" the ownership of the state-owned Associated Newspapers of Ceylon ("Lake House"); the establishment of a National Media Institute to provide the professional needs of journalists; and legal reform.

In November and December 1994 the Media Minister appointed four committees to make recommendations on the

implementation of the media policy in the following four areas: legal reform; establishment of a Media Institute; improvement of the salaries, pensions, professional benefits and service conditions of media personnel; and broadbasing ownership of Lake House newspapers. The committees were given three months to submit their reports to the Media Ministry.

The government's media policy was put severely to the test in the first months of PA government rule. Although there was a welcome opening up of the space for dissent and for the presentation of alternative political positions in the media, the government was accused of misusing the state-run media during the presidential election campaign in the manner of its predecessor. Direct governmental interference in the media began after the assassination of UNP presidential candidate, Gamini Dissanayake, apparently by an LTTE suicide-bomber.

The government had begun preliminary negotiations with the LTTE soon after coming to power; who was believed to be responsible for this assassination thus became an issue of great sensitivity. Journalists working in the state-owned media were instructed not to report that the LTTE were believed to be responsible for the bombing, and stories which might have implicated the LTTE in the assassination were withdrawn under political pressure. Some news on this issue broadcast on SLBC was also said to have been invented.<sup>4</sup> On 28 October 1994 the front pages of the *Dinamina* and the *Daily News* were remade by staff at the Prime Minister's

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<sup>4</sup> Free Media Movement press release, *Misuse of state media organs and interfering with private-owned media by the PA Government for the election campaign* (3 November 1994)

office. According to the Free Media Movement, 17,000 copies of the 28 October issue of the *Daily News* and 25,000 copies of the *Dinamina* were withdrawn and then reprinted with alterations to their front pages. A new lead story was created under the headline: "I have complete faith in the security forces: Prime Minister," as well as other changes. For the next several days, the front pages of these papers had to be sent to Temple Trees for scrutiny before going to press, but no further changes were reported. More generally, journalists working in the state-owned media had their reporting restricted in various ways. The Media Minister, when challenged about these events, admitted that there had been direct interference, which he blamed on "over-zealous" individuals acting without the president's knowledge. This public admission of interference came well after the election, when it was too late to redress the imbalanced coverage.<sup>5</sup>

The editor of a Sinhala tabloid, *Trishule*, was charged under the PTA with incitement to violence for publishing on 7 November 1994 an article which called for the Sinhalese people to "rise up" and fight for their rights, which he said were threatened by the negotiations between the government and the LTTE. The magistrate deemed his arrest unlawful and dismissed the charges.<sup>6</sup>

The state-owned press was said to have censored certain UNP advertisements; the UNP complained of three such

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<sup>5</sup> See INFORM, *Situation Report - November 1994*; and Article 19, *Words into Action: Censorship and Media Reform in Sri Lanka*, Censorship News Issue 39 (March 1995)

<sup>6</sup> INFORM, *Situation Report - November 1994*

incidents. There were also numerous complaints about the nature of broadcasts transmitted on SLRC during the election campaign, and the fact that centre page feature articles in the *Daily News* sometimes simply reiterated the text of PA advertisements appearing in the same issue.

Discussion of censorship was also censored during the presidential election period, as experienced by the Education Service of the SLBC, whose programme on this subject was not permitted to be broadcast.<sup>7</sup> Censorship of this service continued after the election was over. For example, its program on the relationship between Buddhism and the secular state in Sri Lanka was also banned in December 1994.

Other instances of censorship in the state-owned press did not relate to the election or party political issues at all. For example, the International Assembly of Young Men's Muslim Associations (IAYMMA), Sri Lanka, believed that a new prayer timetable which had been issued was based on incorrect calculations. The IAYMMA complained that the state-owned media, and particularly the Tamil paper *Thinakaran*, refused to carry its views, despite carrying statements from supporters of the new timetable. The IAYMMA said that a deputy minister had instructed the *Thinakaran* not to publish its views. The *Observer* also refused to carry a paid advertisement putting forward the IAYMMA viewpoint in late December 1994, and told the IAYMMA that it should get approval from the Ministry of Muslim Cultural Affairs before the paper would carry the advertisement.<sup>8</sup>

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<sup>7</sup> See Article 19, *Words into Action*, supra n 5

<sup>8</sup> *Ibid*



Reports of censorship and interference in the media continued into 1995.<sup>9</sup> While it was heartening that the Media Minister apologised to the public for certain incidents reported in 1994 and promised inquiries into them, the results were not made known.

## 9. Conclusions and Recommendations

There is a clear need for legislative and institutional reform to be implemented if media freedom is to be assured. Without such measures, there is nothing to prevent the government, or sections of it, from exercising pressure on the media whenever it feels it "necessary" to do so. The four committees appointed to report on how the media policy should be implemented were not due to submit their reports until 1995 - and did not do so within the stipulated three months of their appointment. It is to be hoped that once their reports are submitted and the issues properly debated, the government will act promptly to ensure that its stated policy is properly implemented. In addition to the state-owned press, full consideration needs also to be given to how the state-owned broadcasting media can also be guaranteed editorial independence.<sup>10</sup>

Legislative and institutional reforms designed to protect media freedom are necessary for an environment to be created within which journalists can develop their professional skills

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<sup>9</sup> INFORM, *Situation Reports*; Article 19, *Words into Action*, supra n 5

<sup>10</sup> See Article 19, supra n 5

and address some of the problems they have faced in developing a culture of independent journalism. While journalists and media institutions still remain vulnerable to political pressures, these problems cannot be properly and fully addressed.

## **IX**

# **Cultural Rights: The Right of Artistic Expression**

### **1. Introduction**

“Raising the moral and cultural standards of the People, and ensuring the full development of human personality” are defined as among the Directive Principles of State Policy in the 1978 Constitution under Article 27(2)(g). Cultural rights are also involved in the acceptance in Chapter 3 of the Constitution of “the freedom of speech and expression, including publication” as one of the rights to which every citizen is entitled under Article 14(1)(a). The exercise of these rights, however, is circumscribed by the restrictions set out in Article 15(2) which permits restrictions on freedom of expression “as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.” Implied in the Constitution of Sri Lanka, therefore, is a role of the state as a guardian of culture, promoting and fostering cultural expression, but with the concomitant control that guardianship usually entails.

The restrictions on freedom of expression permitted under the Constitution of Sri Lanka are considerably broader in

scope than those permitted under the ICCPR. Article 19(3) of the ICCPR permits only such restrictions on freedom of expression as are provided by law and are "necessary" for the respect of the rights or reputations of others, for the protection of national security or of public order, or of public health or morals.

Historically, the Sri Lankan State before 1956 assumed a largely *laissez-faire* policy towards culture and the arts, in spite of the establishment of an Arts Council of Ceylon and the existence of a censoring body for films and plays under the Public Performances Act. Since the culture that was recognised and assisted by the former institution was largely elitist, and the emergence of an indigenous theatre and cinema confronting controversial social and political questions had not yet taken place, the tasks of censorship were less complex.

After 1956, however, the state began to play an activist and interventionist role in culture, signaled by the creation of a Ministry of Cultural Affairs and other official cultural bodies. But the same period also saw a new dynamism in creative activity in the arts - the growth of a new theatre, cinema and literature appealing to audiences whose numbers had been widened and cultural standards raised by the broader dissemination of literacy and education. It is in the context of these social developments that the duality of the role that the state has assumed in relation to culture - both fostering and restrictive - raises issues that continue to provoke controversy. Further, the state's active involvement in the promotion of culture coincided with the rise to political hegemony of Sinhala nationalism, so that over the last four decades state assistance to literature and the other arts has

been principally directed towards Sinhala cultural groups and creative artists, while minority cultural activity has been little helped.

## **2. Cultural Policy Under the PA Government**

The manifesto of the PA, which won the 1994 general election, carried, as the most important part of its pronouncement on cultural policy, the following promises:

*The PA recognises the importance of culture as a necessary dimension of total development, and an essential component of overall planning and a medium of national integration.*

*In order to implement this, a National Council for Cultural Policy and Planning will be established, with an agenda flexible and able to meet the needs of our society, and the changes it is likely to undergo. The Council will be representative of all ethnic groups, religions and regions. It will be responsible directly to Parliament...*

*While maintaining the autonomy of the arts and literature, steps will be taken to restore the autonomy of the National Arts Council and the Sahitya Mandalaya [Literary Society], with the minimum of interference by the State but with substantial assistance.*

These pledges of restoring the autonomy of cultural institutions set up by the state were welcome as an intended departure from the bureaucratic control of culture over four decades. However, by the end of 1994 the promised National Council for Cultural Policy and Planning had not materialised. There

was one desirable change from the practices of the past: at the national Literature Festival (originally scheduled for December 1994 but postponed to January 1995), literature in Sinhala, Tamil and English were all represented and prizes were given to books in all three languages. As an indication of a first step in the direction of recognition of the diversity of cultures in Sri Lanka, this was welcome.

However, other actions of the Ministry of Cultural Affairs after the change of government have not been in keeping with the promises of cultural autonomy. The Arts Council and its panels (for different fields of cultural activity) were reconstituted. Under the Arts Council Act, it is the members of the Council who are empowered to select and appoint these panels, but panel members were in fact chosen by the Ministry, and the president of the Arts Council only signed the letters of appointment. This fact was admitted by the president of the Arts Council, Professor M.B. Ariyapala, in an interview over the SLBC. It was subsequently confirmed by Professor D.C.R.A. Goonetilleke, chairperson of the English Literature panel, who said in a letter to *The Island*,<sup>1</sup> "The Chairperson and the members of the panel are appointed by the Ministry of Cultural Affairs." With no signs forthcoming of the creation of the National Council for Cultural Policy and Planning promised in the PA manifesto, there is a danger of the Ministry of Cultural Affairs settling down to work within the old bureaucratic structures and methods of dealing with cultural policy.

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<sup>1</sup> 13 March 1995



### **3. Censorship**

#### **3.1 Censorship and Literature, Painting, Plays and Films**

There is a dichotomy in state policies of regulation with regard to culture which raises important questions of principle. Literature, painting and the other traditional visual arts are not in normal times subject to censorship, although under emergency rule, these could also be legally covered by the provisions for censorship. It is possible to conceive of a situation, even under non-emergency conditions, in which the laws relating to sedition, obscenity, profanity, defamation, incitement to violence or arousing of hostility between communities could be used to prosecute, say, a novelist or a painter, but such action would have to follow the publication of the work in question and the charges would have to be made in a court of law. In other words, literature and painting are not normally open to pre-publication or pre-exhibition censorship, and there is no statutory authority which can legally exercise such censorship.

Plays and films are the object of a very different degree and mode of regulation by the state, being subject to censorship by the Public Performances Board (PPB). Under the law, such censorship could also cover other public performances such as musical concerts or dance recitals, although these arts have not in practice been the subject of scrutiny by the Board. Why is theatre or cinema treated as more 'dangerous' than literature or painting and therefore in need of censorship before availability to the public? Probably because of an irrational fear on the part of state authorities that if unregulated, the visual and dramatic power of the former media will

be used in ways that will endanger political or moral order. But the freedom from pre-performance censorship that music and dance have enjoyed in practice, or the freedom from pre-publication censorship of literature or from pre-exhibition censorship of painting or sculpture, has not led to an orgy of obscenity or subversive material in these media because artists have been well aware of the constraints placed on 'free' expression by public opinion as well as by the laws constituting certain offences. There is no reason to think that freeing theatre or film from pre-performance censorship would lead to any more disastrous consequences.

If a novelist or publisher were prosecuted in a court of law for obscenity or defamation, he or she would have the right of defence, and the prosecution's case would have to be reasonably established to the satisfaction of the court. No such conditions apply when a play or a film is banned by the PPB. In fact, the Board is not even obliged under the Public Performances Act to give reasons for its decision, making possible subjective and arbitrary judgments. If a certificate for performance is refused by the Board, there is provision in the Act for appeal to the Minister in charge of the subject, but the Act states that the Minister's decision shall be "final and conclusive." What happens in practice when a play or film is banned by the Board is that a process of informal bargaining goes on between playwright, producer or film-maker on the one hand and the Board or its chairman on the other, which sometimes results in the play or film concerned being released with cuts. Several films banned by the Board in 1993 were released through this process in 1994, and one film held up in 1994, apparently on 'moral' grounds - *Surangana Yahana* - remained under ban at the end of the year.

In gauging the extent of the curbs on freedom of expression placed by theatrical or film censorship, however, it is inadequate only to consider the cases of actual intervention by the PPB. It has to be recognised that bans and cuts by the Board are only the tip of the iceberg of censorship, and that what remains invisible is the extent of self-censorship by people working in the theatre or the cinema because of fear of official censorship. This would be a particularly daunting factor in respect of films, since few producers would be willing to risk investment in a film that might be turned down by the Board.

A frequent complaint against the PPB, in respect of its treatment of films, is the duality of the standards it applies to imported and nationally produced (usually Sinhala-language) films. There is greater tolerance by the censors of material involving visual presentation of sexual relations and violence in foreign than in national films.

### **3.2 Censorship within State-Controlled Media**

Neither television nor radio has been within the ambit of the PPB, although a proposal to bring television within its scope is discussed later in this chapter. However, the state broadcasting institutions of radio and television in their daily functioning transmit programmes that fall within the genres of the arts, and they have their own censoring authorities and procedures. Outside the programmes produced within the SLRC and the SLBC, which are subject to internal controls, censorship is exercised in respect of material produced by persons outside these institutions and offered to them for transmission. Such material consists principally of

teledramas in the case of the SLRC and of songs in that of the SLBC. To deal with teledramas, the SLRC has its own boards which review these productions, first, at the script stage and secondly, after production. Both political and moral censorship are exercised by these mechanisms.

A more silent and invisible form of censorship exists at the SLBC in respect of songs. It must be observed at this stage that the SLBC is the principal medium through which songs are popularised, especially when a new cassette is released by a singer. Unlike in the case of the SLRC, where the boards charged with the censoring function have at least to inform the producer of a teledrama that the production has been accepted or rejected, the SLBC is under no similar obligation. It can exclude a song or a cassette by the simple procedure of refraining from broadcasting it, and the officials who exercise this power remain anonymous and unidentified. Songs may be "banned" in this way either because their content is considered politically dangerous, or because a composer or singer is personally on the political blacklist (this happened to well-known performers such as Premasiri Khemadasa and Nanda Malini for many years), or because fortuitous circumstances have attached a political meaning to the words of a song.

In this last category an old film song, *Rajini mamai ape rajye* ("I am the queen of our realm") was not broadcast by the SLBC for many years until 1994. Although in its original film context it was sung by the heroine about the forest wilderness in which she was living, it was now considered politically undesirable because the leading opposition party was led by two women. However, after the change of government in 1994 the very same identification led

to the song being broadcast immediately after the swearing-in of the new woman president!

### **3.3 Extension of Censorship?**

The pre-election manifesto of the PA contains the following proposal:

*The Public Performances Board Act will be revised to include modern visual media, such as television and video.*

In the absence of any explanation of this proposal, it is necessary to speculate on the motivations of this proposed enlargement of the scope of the PPB. Since the SLRC (as well as the ITN, also owned by the state) have their own internal censoring mechanisms, it is possible that this proposal represents an attempt to bring under censorship the new, privately-owned television channels licensed by the state. If so, such a move would run counter to the general pledges of freedom of the media also contained in the manifesto and so often reiterated by government spokespersons.

The proposal to bring video under the PPB is perhaps even more disturbing. The great advantage of the video medium is that it promotes the democratisation of communication because it is within the reach of individuals and small groups. During the era of tight controls by the state of official media (print, auditory and visual), video was one of the means by which alternative viewpoints and information could be disseminated, at least to small audiences, because there was no easy mechanism by which it could be censored. To deprive people of this channel of expression would be

a serious blow to the right of free communication. Once again it must be asked why visual media should be so feared, and why it should be thought that an alternative video mode of communication has less right to exist alongside state television than an alternative tabloid press has to exist in competition with the state press and big private newspaper combines. If the danger is that of "blue" films being made on video, that is a matter not for censorship but for police detection, since such films will never be submitted to an enlarged PPB but continue to be made surreptitiously. However, by the end of 1994 there had been no action to implement the promise (or threat) of an enlarged scope for the PPB.

### **3.4 Censorship of Foreign Publications**

Foreign publications - books as well as periodicals - are sometimes prevented from entering the country by the Customs, using its powers under the Customs Ordinance. Some of the material so withheld from Sri Lankan readers is pornographic, or deemed to be such by the Customs, but it has also happened from time to time that imported publications have been held up by the Customs for political or quasi-political reasons. In any case, the exercise by the Customs, in respect of publications, of powers given to them for the purpose of dealing with contraband commodities amounts to a form of censorship that is wielded by an unqualified authority. The importer of any publication detained or confiscated by the Customs has no remedy short of appeal to the courts.



A special case of state censorship occurred in 1994 in respect of the book *Lajja* - a novel by the Bangladeshi woman writer Taslima Nasrin. Following the banning of the book by the Government of Bangladesh because it was held to be anti-Islamic - an action that was accompanied by death threats against the writer - Mr A.H.M. Aswer, then Minister of State for Muslim Religious and Cultural Affairs, asked for a ban on the book by the Sri Lankan Government. The cabinet issued a statement that the book was banned, and it was withdrawn from shelves by booksellers. However, lawyers have questioned the legal status of this statement, querying whether the cabinet has legal powers to ban publications in this manner. In replying to criticisms that he had not read the book before demanding that it be banned, Mr. Aswer said that he had read it "with adequate care,"<sup>2</sup> but it is unlikely that the members of the cabinet in general had done so. The "ban" on *Lajja* was opposed by the Free Media Movement as "an infringement of the right of freedom of expression." There was much controversy about the "ban" in the press: several readers, including some Muslims, criticised the government's action. It is noteworthy that the "banning" of *Lajja* took place during the run-up to the general election of August 1994, and that an anxiety to satisfy Muslim voters that their interests were being protected by the government in power may have contributed to the decision. India, which has a large Muslim minority, has not censored the book.

Such censorship of a book by cabinet decision is an unusual step; the only other recent example is that of Salman Rushdie's *The Satanic Verses*, the prohibition on whose import and

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2. *The Sunday Times*, 31 July 1994

sale continues in force. In both these cases, the mechanism adopted was related to the pressure of powerful representatives of a significant ethnic group.

#### **4. Conclusion**

State assistance to the arts is necessary because culture is one of the fields that should not simply be left to the operation of the free market. But the price of such assistance should not be state-imposed restrictions and controls. The various mechanisms of prior censorship enforced on the arts should be removed, since there is no justification for denying to cinema or theatre the degree of freedom that privately owned press, radio or television possesses. Further, state-sponsored institutions for promoting cultural activity should be manned by genuinely independent persons of intelligence and sensitivity and freed from political or bureaucratic interference.

# X

## Workers' Rights

### 1. Introduction

The rights of workers are entrenched in the Bill of Rights found in Chapter 3 of the Constitution of Sri Lanka and in specific labour legislation. In addition, the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR) have special reference to rights of labour. As these Covenants have been ratified by the government, they constitute an international instrument that has application in Sri Lanka. Besides these, the International Labour Organization (ILO) Conventions, some of which have been ratified by Sri Lanka, also constitute internationally accepted standards to be followed.

In last year's volume we provided a detailed examination of the ILO Conventions on freedom of association - especially Conventions No. 87 and 98 - and an assessment of the extent to which these standards are achieved in Sri Lanka. To this end, we examined the provisions of the Constitution pertaining to freedom of association and the Trade Unions Ordinance, as well as some other relevant legislation pertaining

to trade union rights.<sup>1</sup> This year we concentrate on specific areas of workers' rights that were important during 1994, while also referring to ongoing issues from previous years. We also provide a summary of the labour legislation in force during 1994.

## 2. Trade Unions

Sri Lanka has a long record of legalised trade unions, the principal enactment having been made in 1935.<sup>2</sup> Subsequent amendments were made to this statute in 1946, 1948, 1958 and 1970.

No significant judicial decisions relating to trade unions were made in 1994. The Commissioner of Labour in his capacity as Registrar of Trade Unions exercised his supervisory functions over trade unions both in the public and private sectors under the Trade Union Ordinance. At the close of 1993 there were 1,059 trade unions duly registered and satisfying the regulations for remaining on the register.

The drastic measures, which violated both national and international norms, taken by the government of President J.R. Jayewardene in July 1980 to cripple the general strike have had their effect on the working class movement as a whole and affected the large trade unions during the succeeding years. The Essential Public Services Act No. 61 of 1979 was a drastic law enabling the president to

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<sup>1</sup> *Sri Lanka: State of Human Rights 1993* (Law & Society Trust, Colombo, 1994) Chapter 3.III

<sup>2</sup> The Trade Union Ordinance No. 14 of 1935

declare as essential services, any services rendered by certain government departments, public corporations and local authorities. In July 1980, the president declared a state of emergency, and under emergency regulation declared a broad range of public and private enterprises as essential services. The strikers - who numbered 40,000 according to government sources and between 80,000 and 100,000 according to trade union sources - were deemed to have vacated their posts with effect from the date of the strike: 16 July 1981.

After President Ranasinghe Premadasa assumed office in 1989, he decided to give some relief to the strikers. The cabinet decision of 8 May 1989 was embodied in Public Administration Circular No. 32/89, and enabled the head of the public services to reinstate most public sector workers and grant others retirement benefits as if they had been in continuous service. This directive covered the state corporation employees who had struck work but did not help private sector workers (in about 13 companies) to obtain any relief.

In 1994 only few strikers in the public service remained deprived of their livelihood. The outstanding issue yet unresolved from the July 1980 strike, which was before the Minister of Labour and his officials during 1994, was the plight of the thousand or more private sector workers who had answered the strike call in 1980 and been summarily dismissed on the ground that they had vacated their posts. The unions that called their membership out in July 1980 have not assisted these victims. Instead, more than one *ad hoc* organisation took up the issues with the then Minister of Labour, and then made representations to the new Minister and Commissioner of Labour with a view to obtaining redress.

The Public Administration Circular No. 32/89 is inapplicable to the private sector, so some form of enabling legislation based on a private member's motion passed by parliament will be necessary for the government to release funds to meet the legitimate claims of the private sector strikers.

### **3. Emergency Regulations**

Emergency regulations made by presidential decree under the provisions of the Public Security Ordinance can have the effect of curtailing the rights of citizens, including workers.<sup>3</sup> Taken along with the Essential Services Act of 1989, under which the president may declare any strike illegal under the maintenance of essential supplies and services and the maintenance of exports, the emergency regulations can be used to prevent strike action. Such regulations relating to essential services remained in force in 1994 up to 16 July, when the emergency was allowed to lapse for one month. Regulation 32 on essential services was reintroduced on 16 August, when a new state of emergency was declared; it was then dropped on 4 September. However, it was reintroduced in the emergency declaration which was in force from 24 October to 4 November 1994. Thereafter, the regulations relating to essential services were again dropped.

### **4. The Change of Government and Workers' Rights**

Both the parliamentary election of August 1994 and, especially, the presidential election of November 1994, had the resounding

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<sup>3</sup> See also Chapter III on Emergency Rule



effect of reducing the tension and the suppression of people's rights that had been a feature of Sri Lankan national life for many years. The emergency, which had been maintained island-wide by three successive UNP governments, was allowed to lapse temporarily. After it was re-introduced in specified areas of the country, as described in Chapter III, the regulations relating to essential services, which curb the rights of workers, were in force at certain times, as described above.

The PA's election promise to formulate and implement a comprehensive Workers' Charter in regard to trade union rights and the compulsory recognition of trade unions had not been implemented by the end of 1994.

Following the change of government, long pent-up urges to agitate for realisation of their rights, now that the climate of fear and suppression had been removed, found expression in widespread and vigorous protest actions. By mid-December 1994 there were over 60 strikes going on in different parts of the country, and in both the public and private sectors.<sup>4</sup> They included strikes in hitherto non-unionised industries in the Free Trade Zones (FTZs). Some of the strikers resorted to drastic criminal measures such as "gheraoing" - the forceful detention of top management personnel - and other acts of intimidation. Several factories were closed down and a number of workers were dismissed.

There were also significant tensions evident among different ranks of professionals, some of which resulted in strike action. Conflicts were evident between such groups as doctors and Registered Medical Officers, nurses and doctors, and

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<sup>4</sup> INFORM, *An Overview of the Human Rights Situation in Sri Lanka: 1994* (15 February 1995)

engineers and those holding the National Diploma of Technology.<sup>5</sup>

There were also significant protest movements, with conspicuous picket lines, demonstrations and rallies especially in Colombo, against privatisation plans and the government's alleged subservience to the dictates of the World Bank, the International Monetary Fund and the Asian Development Bank (ADB).

Recognised non-aligned trade unions such as the Ceylon Bank Employees' Union also expressed strong disapproval of what they saw as the continuation by the PA of the privatisation policies of the UNP. The PA had stated in its manifesto that public utilities which are essential for day to day life must function under government auspices, though with adequate autonomy for efficient management. Specific mention had been made of the health and education sectors, which were largely under state control. The pre-election literature also listed water supply, power generation, highways, railways, irrigation, state banks, public sector insurance, Cooperative Wholesale Establishment, ports, shipping and airports. Most active unions took the position that all state enterprises catering to the ordinary citizen should be retained under state control.

The government called upon workers to be patient and non-combative, and to give it time to implement its policies.<sup>6</sup> It also proposed that it would set up a special police unit to deal with this outburst of industrial unrest, but this proposal

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<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*

was apparently set aside, perhaps because of the virulent opposition expressed by the organised working class. No special action was taken apart from using the mediation services of the Commissioner of Labour under the Industrial Disputes Act.

## **5. Current Labour Legislation**

The following legal enactments were in operation during 1994 to safeguard the rights of workers:

- (i) **The Industrial Disputes Act No. 43 of 1950** and amendments empower the Minister of Labour and the Commissioner of Labour to intervene in labour disputes to arbitrate, mediate and settle in other ways outstanding issues. Collective agreements negotiated by trade unions with employers were a standard device in this field. Aggrieved trade unions and individual workers had access to labour tribunals in cases of unjust termination, while labour officers up and down the country were able to redress grievances especially in regard to non-payment of statutory dues, and could prosecute errant employers where necessary.
- (ii) **Termination of Employment of Workmen (Special Provisions) Act No. 45 of 1971** continued to operate in 1994 in respect of industrial disputes where certain investors in Board of Investment enterprises sought to terminate the services of workers as a result of proposed closure or retrenchment. This legislation provides for workers an excellent "insurance" against arbitrary acts of dismissal by employers. It has been

threatened by criticisms made by the powerful investors' lobby.

- (iii) **Wages Boards Ordinance No. 27 of 1941**,<sup>7</sup> a colonial heritage, continued to operate in 1994, fixing minimum wages and providing for such matters as wage payments and hours of work. During 1994 the nursing home trade and the janitorial trade were brought under Part II of the Ordinance, thus stipulating minimum wages, overtime rates and other such matters in these sectors.
- (iv) **Workmen's Compensation Ordinance No. 19 of 1934**, which also dates from British times, makes it mandatory for employers to compensate victims of industrial accidents, empowering the Commissioner to assume a quasi-judicial role in resolving disputes between parties. Enhanced rates of payment, and modalities including the time schedules, were embodied in the Gazette Extraordinary No. 754/3 of 15 February 1993, the effects of which were evident during 1994.
- (v) **The Shop and Office Employees Act No. 19 of 1954** stipulates and regulates hours of work, leave, holidays and working conditions for shop and office workers.
- (vi) **Employees' Provident Fund Act No. 15 of 1958** enables workers to have an accumulated saving which enables them to draw a lump sum on retirement at an optional age, or in the case of females on

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<sup>7</sup> Amended by Ordinance Nos. 40 of 1943, 19 of 1945, 22 of 1945, and Acts Nos. 5 of 1953, 27 of 1957, 27 of 1962, 17 of 1965, 23 of 1966, 24 of 1966, 29 of 1971, 10 of 1978, 10 of 1980 and 36 of 1982

marriage and concomitant premature retirement. Recent amendments to the Act extend its scope to all categories of workers, including casual workers, trainees and persons above the age of retirement. It also enables members to obtain loans from banks on the security of the balance held in deposit.

- (vii) **The Employees' Trust Fund Act No. 46 of '1980**, inaugurated by the previous UNP government, is another attractive scheme whereby the employer's contribution of 3% of gross salary is remitted to the statutory board set up under this Act. Apart from the entitlement to draw the accruals inclusive of interest at any point on retirement or resignation, there are many other benefits such as insurance premia payments, medical benefits for cardiac surgery and eye surgery, and token payments to fifth year scholarship winners.
- (viii) **Factories Ordinance Nos. 45 of 1942 and 22 of 1946**, also of colonial vintage, continued to benefit workers in industry by attempting to ensure minimum standards of industrial safety. Both the Occupational Hygiene branch of the Department of Labour and the Factories Inspection Engineers have been actively engaged in the task of ensuring industrial safety.
- (ix) **Payment of Gratuity Act Nos. 12 of 1983 and 41 of 1990**. Under this Act, the amount of the gratuity payable is now statutorily determined and the Labour Department is the authority in the event of a dispute. Previously, the amount of the gratuity payable was subject to the adjudication of the Labour

Tribunal. The Labour Tribunal now only comes into the picture where the period of service falls short of the statutory minimum and the matter has to be adjudicated.

- (x) **Maternity Benefits Ordinance No. 32 of 1939**,<sup>8</sup> also of colonial vintage, was amended in 1985 to provide among other benefits a statutory maternity leave period of 84 days.<sup>9</sup>
- (xi) **Employment of Women, Young Persons and Children Act No. 47 of 1956**<sup>10</sup> lays down conditions of employment for women, young persons and children, including hours of work and night shifts.<sup>11</sup>
- (xii) **Foreign Employment Bureau Act No. 21 of 1985.** The scope of the Foreign Employment Bureau was enlarged in 1994 to assist particularly women workers seeking employment in West Asia and other overseas countries, by providing orientation and training courses. Sri Lankan diplomatic missions have also given assistance to migrant Sri Lankan workers in certain areas, such as Kuwait, where special labour liaison officers help them with regard to such problems as maltreatment and industrial accidents. In one case in 1994 the Bureau paid compensation to a

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<sup>8</sup> As amended by Acts Nos. 35 of 1946, 26 of 1952, 6 of 1958, 24 of 1962, 1 of 1966, 13 of 1978, 52 of 1981 and 43 of 1985

<sup>9</sup> See also Chapter XVI on women's rights

<sup>10</sup> As amended by Act Nos. 43 of 1964, 23 of 1973, 24 of 1973 and 32 of 1984

<sup>11</sup> See also Chapters XV and XVI on children's and women's rights respectively for more on this Act



female factory worker who suffered extensive burns in an accident in Sharjah.

## 6. ILO Conventions

As a member of the ILO with representation of both official and worker delegates, Sri Lanka is obliged to follow the international labour standards contained in ILO Conventions. ILO Conventions No. 87 and No. 98 are comprehensive standards, and have been ratified by Sri Lanka.<sup>12</sup> The ILO has at times expressed concern about the infringements of international labour standards in Sri Lanka. For example, the preferential treatment given by the previous UNP government to the Jathika Sevaka Sangamaya, which is closely linked to the UNP, is contrary to the provisions of Convention No. 98. The prohibition in Sri Lanka on public service unions federating is also contrary to this Convention. In practice, however, the Sri Lankan labour authorities have virtually turned a blind eye to this prohibition and the Public Service Trade Union Federation is recognised for most purposes. Prohibition of the unionisation of armed forces personnel and of law enforcement officers (police and prison officers) is also contrary to Convention No. 98. The machinery for the resolution of labour disputes in Board of Investment enterprises in lieu of authentic duly registered trade unions is also not in conformity with ILO standards. The Joint Consultative Council - which consists of an equal number of representatives elected by the workers and nominated by the management, with the company's chief

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<sup>12</sup> For a detailed discussion of these Conventions, see *Sri Lanka: State of Human Rights 1993* (Law & Society Trust, Colombo, 1994) Chapter 3.III

executive as chairperson - does not function as a legitimate worker organisation. In one known case brought before the Termination Unit of the Labour Department for adjudication, the elected representatives of the workers on the Council were victimised by the management for not following the management line.<sup>13</sup>

## **7. Judicial Decisions Affecting Workers' Rights in 1994**

One noteworthy decision, in CA 682/89, arose from a magistrate court case where a sum of Rs. 36,307.15 as alleged contributions with surcharges had been ordered by the Commissioner of Labour to be paid by the petitioner company in respect of Employees' Provident Fund dues of a former employee of that company. The appeal to the Court of Appeal was for a mandate in the nature of a writ of certiorari and prohibition restraining the magistrate from proceeding with the case, and for a declaration that the sum was not payable by the petitioners. The Court dismissed the application, however, thus upholding the determination of the Commissioner of Labour. This judgment of Justice H.W. Senanayaka may not be a landmark judgment affecting the interpretation of statute law, but was nevertheless important in upholding the administrative action taken by the Commissioner of Labour and his Deputy under the relevant Act.

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<sup>13</sup> GCEC Labour Standards and Relations Termination Unit case: members of the Council were singled out for termination

## **8. Public Sector Workers**

The labour legislation referred to above does not apply to workers in government service in ministries. With the current trend towards privatisation, more such workers will come under the aegis of the private sector and will thus be covered by existing labour law. However, the position of public sector employees is that, with a few exceptions, they hold office at the pleasure of the state. Their only recourse in the event of being aggrieved by orders of state officials is to the Public Services Commission. They have also had increasing access to the Supreme Court through fundamental rights actions, provided they can cite the particular constitutional right that is alleged to have been violated.



**TABLE 2 Trade Unions**

| Item                 | 1989      | 1990    | 1991      | 1992    | 1993  |
|----------------------|-----------|---------|-----------|---------|-------|
| Registered (1)       | 82        | 83      | 86        | 150     | 154   |
| Cancelled (1)        | 27        | 55      | 140       | 202     | 25    |
| Functioning (2)      | 1,004     | 1,032   | 1,083     | 1,039   | 1,151 |
| Total membership (3) | 1,496,001 | 904,582 | 1,136,440 | 884,226 | -     |

Note: (1) During the year  
 (2) End of the year  
 (3) Reported unions only

Source: Department of Labour

**TABLE 3 Percentage Distribution of Currently Employed Population by Major Industrial Group of the Main Occupation**

| Major Industrial Group               | Sector  |         |         |
|--------------------------------------|---------|---------|---------|
|                                      | Total % | Urban % | Rural % |
| Total                                | 100.00  | 100.00  | 100.00  |
| Agriculture, Livestock and Fisheries | 42.6    | 13.5    | 49.3    |
| Mining & Quarrying                   | 0.6     | 0.5     | 0.6     |
| Manufacturing                        | 15.2    | 17.8    | 14.6    |
| Electricity & Gas                    | 0.4     | 0.4     | 0.4     |
| Construction                         | 3.3     | 5.0     | 3.0     |
| Trade & Hotels etc.                  | 12.9    | 18.5    | 11.7    |
| Transport Communication              | 4.0     | 6.6     | 3.4     |
| Insurance & Real Estate              | 16.0    | 28.4    | 13.2    |
| Not defined                          | 3.1     | 2.9     | 3.1     |

Source: Department of Census and Statistics

# **XI**

## **Economic and Social Rights**

### **1. Introduction**

Sri Lanka is a nation of paradoxes. Its good social indicators are indeed comparable on many counts to developed nations. Its fabric of multi-religious, multi-ethnic, multi-lingual society and a tradition of political pluralism is, however, contradicted by civil, political and ethnic violence that has exacted a toll on its distributive processes. The resort to violent means for conflict resolution by the state, the spate of political assassinations, police brutality and the use of force by extra-governmental forces have matched in no unequal terms that propagated by contenders to the state. The promise of an end to state initiated and state condoned violence pledged by the newly elected PA government is a long awaited hope, one that is an essential percussor to resolving the inequities that the country has for so long been plagued with.

The 1948 Universal Declaration of Human Rights (UDHR), acknowledged by most democratic polities, entails a range of civil liberties essential for protecting and assuring not only the right to life, but to at least a minimum standard of living. These include the right to be free from cruel



and inhuman treatment and arbitrary detention and the rights to due process, freedom of privacy and mobility, the right to free expression, free media, the rights against ethnic and gender discrimination, slavery and forced prostitution, and access to adequate standards of health, education and housing. Violations of the first set of rights governing the state, law and authority, however, have been common particularly during Sri Lanka's recent past. Yet, Sri Lanka has for long commended itself on its social achievements, a claim often difficult to challenge based at least on the social indicators.

Routine infringement of civil liberties often occurs in an insidious manner. Such encroachments on basic rights are related to unequal allocations between men and women, between ethnic groups, the rural and the urban (or often between regions) and, more ominously, along the dimension of attitudes and practices. While legal enactments may prohibit certain discriminatory practices, the lax enforcement of laws encourages such practices. This pattern has been demonstrated in other contexts such as the United States of America (USA) (particularly during the 1950s) and in South Africa. These dual and often interdependent processes of attitudinal and institutional discrimination often serve to reinforce each other, although legal strictures may prohibit the latter. In the USA, for example, while housing discrimination was forbidden by laws formulated in the 1960s, the discriminatory practices such as "red lining" by groups or individuals in power contributed to housing segregation. For example, the "white flight" phenomenon in the United States - the practice of families selling off their homes as soon as an "undesirable element" of colour moves into the neighbourhood - has led to the increasing ghettoisation of America.

Despite the legal provision for fundamental rights in a nation's constitution, discrimination may yet occur because of deep seated prejudices. The term prejudice refers to the psychological axis; it is related to perceptions and assumptions of negative attitudinal stance based on myths and stereotypes of the "other" defined against a notion of "myself" or "ourselves." Discrimination, on the other hand, refers to the behavioural dimension and entails overtly negative actions, practices and behaviours. Violation of human rights occurs where systematic discrimination is embedded in the functioning of state or parastatal institutions. Quite often prejudiced attitudes lead to discriminatory practices which in turn exacerbate institutional discrimination.

This chapter addresses the interrelatedness of such attitudinal and institutional discrimination in Sri Lanka, examining specifically aspects of health care provisioning, access to education and employment. Two factors in the recent history of Sri Lanka have contributed to inequities along these social dimensions. Firstly, the increasing violence that has enveloped the state and its authority structure, leading to an equally violent anti-state response. Secondly, the inequities that some claim are the inevitable outcome of the massive challenge of development during the past two decades.

## **2. Economic Background**

The economic history of Sri Lanka may be neatly divided into four phases: the pre-colonial feudal economy, the colonial revenue-bound plantation economy, the period of post-colonial protectionist economic strategy and the post-1977 export oriented economy. The general strategy of import substitution adhered to from independence up to 1977 emphasised

regulatory mechanisms and quantitative controls. Price controls on essential goods, together with a wide-reaching social welfare program, was characteristic of the low growth scenario during this period. Sri Lanka's average annual rate of growth between 1965 and 1980 in terms of its Gross Domestic Product (GDP) was four per cent.<sup>1</sup> Industry was uncompetitive internationally, and unemployment began rising towards 20% by the mid-1970s.

Regardless of the policies of import substitution, two forces occurring in tandem - moderate growth of GDP and halting population growth beginning in the mid-1960s - contributed to a significant decline in consumption poverty between 1965 and 1980.<sup>2</sup> Economic growth (as measured by GDP per capita) slowed somewhat between 1970 and 1977 due to endogenous and exogenous factors: a series of droughts which affected agricultural production and oil price increases respectively.

Between 1980 and 1990, the average annual rate of growth remained at four per cent. Although there was only minimal growth in per capita consumption during this period, there was a continued decline in consumption poverty due to better distribution of consumption. Primarily attributed to the post-1989 economic reforms, between 1990 and 1993 consumption per capita is estimated to have grown at 1.8% annually with a further decline in poverty.<sup>3</sup> It is estimated that between 1990 and 1992, there was a corresponding rise in real GDP by an average of 5% and that a further rise to 7% took place in 1993.

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<sup>1</sup> *Sri Lanka Poverty Assessment* (World Bank, Washington D.C., 1994)

<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid*

Despite this continual trend of declining poverty (in depth and severity), about 22.4% of the population of Sri Lanka was estimated to be below the poverty line in 1991 (at a reference poverty line based on a consumption basket of Rs. 471.20 per person per month). The regional distribution of poverty has been measured to indicate that the incidence of poverty is highest in the rural sector (24.4%), and lowest in the estate sector (12.6%), with significantly high poverty rates in the urban sector (18.3%). Given that at least one-fifth of the population are deemed poor in Sri Lanka, the intersection between poverty and the socio-economic aspects of the fundamental right to life need to be kept in mind during the ensuing discussion.

### **3. Health Care: Promoting and Protecting the Health of the People<sup>4</sup>**

The United Nations Declaration on Social Progress and Development<sup>5</sup> includes several articles with specific reference to the provision of health care. Article 10(d) calls for "The achievement of the highest standards of health and the provision of health protection for the entire population, if possible free of charge." Article 19(a) calls for "The provision of free health services to the whole population and of adequate preventive and curative facilities and welfare medical services accessible to all."

A long-standing commitment in Sri Lanka to free health care provision has paid off in relatively high health indicators

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<sup>4</sup> See also the section on health in Chapter XVI on women's rights

<sup>5</sup> Proclaimed by General Assembly Resolution 2542 of 11 December 1969

in Sri Lanka, often parallel to those of developed nations. Sri Lanka's population in 1992 was approximately 17.4 million. The population growth rate was 1.1, expected to further decline to 0.9 by the end of 1994. The crude birth rate in 1992 per 1000 population was 19, a figure that is far lower than Sri Lanka's neighbours in South Asia. The total fertility rate in the country was 2.2 in 1992, while life expectancy hovered around 72 years. Infant mortality rates (per 1000 live births) have decreased dramatically from 69.4 in 1960 to 17.6 in 1992. Sri Lanka's maternal mortality rate in 1992 was 80, compared to 240 in India.

**TABLE 1 Government Expenditure in Health Care**

| Year | % of GDP |
|------|----------|
| 1970 | 1.9      |
| 1976 | 1.7      |
| 1980 | 1.5      |
| 1988 | 1.8      |
| 1992 | 1.5      |

Source: Griffin, C., *Health Care in Asia: A Comparative Study of Costs and Financing*, World Bank Regional and Sectoral Studies (Washington D.C., 1992)

Government expenditure on health as a share of GDP has been quite low, as Table 1 above shows. Considering these low allocations, the good health indicators evident in Sri Lanka may be attributable to other factors. Curiously, the contribution of social and cultural forces to these achievements have gone altogether unrecognised. The comparatively better cultural positioning of women in

Sri Lanka, for example, as compared to other South Asian countries may have been key to the decline in the birth rate. Similarly, the high acceptor rate of family planning methods (66%), low maternal mortality and low infant mortality may be related to aspects of the gender structure. The higher literacy and educational status of women has contributed significantly to the high rates of absorption of and compliance with health education messages, evident for example, in the results of universal coverage achieved by immunization campaigns. Nonetheless, in economically depressed areas, people face multiple deprivations, with poor health and nutrition ranking high among these.

Efforts made by the Ministry of Health (MOH), in conjunction with the supportive human resources background, have contributed to Sri Lanka's good health indicators in many respects. The virtual eradication of polio and diphtheria, for instance, may well be credited to the MOH's wide-reaching campaigns with support from United Nations International Children's Education Fund (UNICEF). With reductions in the incidence of neonatal tetanus, tuberculosis (from 106 per 100,000 population in 1960 to 35.7 in 1991), and whooping cough (118 per 100,000 population in 1960 to 0.2 in 1991), mortality issues for the most part have been addressed. Nonetheless, Sri Lanka's much heralded achievements in health have led to a general complacency with regard to less visible, yet persistent, problems. Morbidity, for example, has remained virtually the same, compounded by the emergence of new diseases and the aggravation of some persistent diseases, such as:

- (1) increased incidence of malaria and mosquito related infections such as dengue haemorrhagic fever and



- Japanese encephalitis (mortality rates per 100,000 population at 344 in 1980, 644 in 1990);
- (2) increased incidence of viral diseases;
  - (3) persistent patterns of acute respiratory infections;
  - (4) annual epidemics of diarrhoea and water borne diseases in some areas (mortality rates per 100,000 population at 42 in 1981, and 195 in 1990; mortality at 0.67 in 1981 and 1.74 in 1990);
  - (5) rapid increase in the incidence of poisoning (accidental and deliberate);
  - (6) increase in the extent of injuries related to road traffic accidents and occupational injuries;
  - (7) increase in diseases traditionally considered as 'geriatric' complaints, such as hypertension, heart disease and cancer (129 hypertensive disease cases per 100,000 population in 1965 and 201 in 1990; 57 cases of ischemic heart disease per 100,000 population in 1970 and 163 in 1990; mortality from the latter at 5.6 per 100,000 population in 1970, 15.1 in 1990);
  - (8) the rise of AIDS/HIV infection, particularly along the coastal belt; and
  - (9) persistent malnutrition of children under 5 years (estimates of wasting averaging at 12.1% in 1980/81, and 18.4% in 1988/89; stunting at 36.6% in 1980/81, and 36.4% in 1988/89).<sup>6</sup>

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<sup>6</sup> "Nutritional Status Survey Report 1981/82 and 1988/89," Nutrition and Janasaviya Division, Ministry of Policy Planning and Implementation; and Ratnayake, R.M.K. and Nestel, P.S., "Nutrition and Health of Sri Lankan Children: Results from the First Nutrition and Health Survey," Report prepared by the Nutrition and Poverty Policy Division, Ministry of Policy Planning and Implementation (1993)

### 3.1 Resource Allocation and Morbidity: Shift from Preventative to Curative Health

The drafting of a new National Health Policy in 1992 suggested that there was a need to reconsider Sri Lanka's approaches towards national health. This document recognised that the persistence of morbidity factors may be related to the inadequate attention given to community health education and preventative health. In the health care budget, public health expenditure has declined from 7% in 1977 to 5% in 1990 of the total budget, and from 1.2% of GDP in 1977 to 1.1% of GDP in 1990. Moreover, a shift in the allocation of resources emphasising curative as compared to preventative health has occurred during the last two decades. Even in 1979, a larger share of resources (64% or nearly two-thirds of the health budget) was allocated towards patient care services. By 1990, however, approximately three-fourths (74%) of health expenditure was incurred in patient care services. Conversely, the allocation for community health services had declined from nearly one-third in 1979 (29%) to a little over one-tenth (13%) of total health expenditure in 1993.

**TABLE 2 Distribution of Health Expenditure by Category and Year (in percentage)**

| Category of Service | 1979 | 1981 | 1983 | 1985 | 1987 | 1990 | 1993 |
|---------------------|------|------|------|------|------|------|------|
| Gen. Admin. & Staff | 7    | 8    | 4    | 7    | 20   | 8    | 24   |
| Patient Care        | 64   | 71   | 81   | 66   | 59   | 74   | 62   |
| Community Health    | 29   | 21   | 16   | 26   | 19   | 17   | 13   |
| Ayurveda            | 0    | 0    | 0    | 0    | 0    | 1    | 0.4  |

Source: Central Bank of Sri Lanka, "National Health Bulletins," 1980-1992 and MOH, personal communique for 1993 data

### **3.2 Differential Access to Health Care**

Inequities in access to health care are most obvious between the rural and the urban contexts, as well as in the differential availability of private versus public health care. The disparities between urban and rural health care infrastructure, services and personnel are vast. As Table 3 below summarises, there has been only a marginal increase (from 483 to 500) in the number of government hospitals in the decade between 1983 and 1993. The size of the population, however, grew from 16 million in 1983 to 17 million in 1993. Furthermore, over 50% of government hospitals are located in the Western, Central and Southern Provinces (in which the rates of urbanisation are higher than the rest of the country). The pressure to service a larger population by the limited number of hospitals in rural areas accounts for the poorer quality of services rendered.

Rural health facilities are, moreover, generally poorly equipped, staffed and maintained. This may imply a lower level of responsiveness to emergency situations. To cite a routine example, Polonnaruwa Base Hospital finds itself ill-equipped in terms of numbers of beds and availability of medication to cope with annual epidemics of diarrhoea. Similarly, the rural hospitals in Anuradhapura district exhaust their supply of medication at the height of each annual dysentery epidemic. These facilities are equally inadequate in coping with unexpected casework, as when the wounded from the conflict in the North East are flown into Polonnaruwa Base Hospital only frequently to discover that equipment for saline and blood transfusions are insufficient.

**TABLE 3 Provincial Distribution of Government Hospitals and Population Served, 1983 and 1993**

| Province      | No. Hospitals<br>1983 | Population<br>served by each | No. Hospitals<br>1993 | Population<br>served by each |
|---------------|-----------------------|------------------------------|-----------------------|------------------------------|
| Central       | 87                    | 23,390                       | 86                    | 25,348                       |
| Southern      | 70                    | 28,142                       | 69                    | 31,985                       |
| Western       | 64                    | 63,218                       | 79                    | 55,531                       |
| Northwestern  | 53                    | 33,754                       | 56                    | 35,696                       |
| Northern      | 51                    | 22,823                       | 47                    | 24,635                       |
| North Central | 46                    | 19,565                       | 49                    | 20,795                       |
| Sabaragamuwa  | 43                    | 35,488                       | 43                    | 38,744                       |
| Uva           | 37                    | 25,594                       | 40                    | 26,125                       |
| Eastern       | 32                    | 32,406                       | 38                    | 35,545                       |
| Total/average | 483                   | 31,917                       | 500                   | 34,367                       |

Source: MOH, Medical Statistics Unit

Wide disparities in the allocation of health care personnel are also common between urban and rural areas. In 1992,<sup>7</sup> the highest concentration of general physicians (45%) and professional nurses (27%) was in Colombo district. The ratio of general physicians per population in Colombo district was 1:2,199, on par with other countries in Asia. Yet, in districts outside Colombo, these ratios were much higher ranging from 1:6,024 to 1:10,000. The overall country level ratio of general physicians to the population in Sri Lanka for 1992 was 1:6,583, while the country level ratios for Pakistan was 1:2,910, 2,520 for India, 1,430 for Malaysia, 1,310 for Singapore and 1,160 for Korea. Although the

<sup>7</sup> Premaratne, C., "Recent Trends and Issues in Health and Nutrition Status of Sri Lanka" in *Staff Studies*, Vol. 22 (1&2) (Central Bank, 1992) pp 85-125

cadre strength of nurses and attendants has increased over the past decade, their concentration in the Western Province, primarily in Colombo district, also accounts for poor service in other regions of the island. Similarly 50% of medical specialists in 1992 served in the Colombo district, while none were available in Ampara and Moneragala districts.<sup>8</sup>

### **3.3 Costs, Quality, and Efficiency of Service Delivery**

Although the cost of public health care from the perspective of the patient is minimal, the poor quality and inefficiency of service provision adds to the opportunity costs incurred in accessing such care. Thus a preference for private care over the public health services is often expressed by the general public. Often public health care facilities are unable to provide a medication which the patient must then purchase at exorbitant rates in the commercial market. The hierarchical and rigid nature of the customary physician-patient relationship leads to non-compliance with, or poor following of, instructions, which contributes to prolonged illnesses. Because of patient overload, physicians pressed for time conduct routine examinations hurriedly. Proper diagnosis, which requires accurate history taking, is often missed in the process.<sup>9</sup> Without an accurate diagnosis, it is common for physicians to prescribe a wide range of medications, aimed at curing a host of possible illnesses, in the hope that the actual ailment might respond to at least one of them.

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<sup>8</sup> *Ibid*

<sup>9</sup> Eg. de Silva, H., "Patient History and Diagnosis," paper by member of Medical Faculty, University of Ruhuna (1993)

### **3.4 Appropriateness of Interventions**

Health interventions which are appropriate, timely and well planned can avoid the threat to life posed by many newly emergent diseases. Among these, HIV/AIDS stands out. However, even among older and more persistent diseases, public tolerance and public health negligence collude in the failure to tackle recurrent and persistent problems such as water borne diseases, acute respiratory illnesses and malaria.

### **3.5 Right to Knowledge and Health Education: Informed Choice**

Public health education occurs in an *ad hoc* manner in Sri Lanka. Community education campaigns, for example, generally occur at the height of an epidemic, rather than being planned in advance, and designed to reach a range of age groups through effective mechanisms such as the media, peer groups and school campaigns.

### **3.6 Other Health Related Issues**

A wide range of laws have been enacted in Sri Lanka to address a variety of public health issues such as the Nuisance Ordinance No. 15 of 1862 (as amended). In addition, local authorities are entrusted with the task of protecting public health. The National Environment Act No. 47 of 1980, as amended by Act No. 56 of 1988, contains provisions on air pollution, water pollution, noise pollution, control of discharging of industrial effluents into waterways and into the atmosphere, and empowers the Central



Environment Authority to formulate regulations on ambient quality standards. Further, the Control of Pesticides Act No. 33 of 1980 regulates the use of pesticides. These laws and regulations have not been very effective in Sri Lanka due to lack of proper co-ordination among the various institutions, outdated laws, ineffective penalties, inadequate ambient quality standards, and lack of enforcement.

### **3.7 Malnutrition**

Because of its low visibility, the extent and implications of the malnutrition rates in Sri Lanka are not taken seriously by many. While the percentage of malnourished children under the age of 5 has been estimated to range from 33% to 35%,<sup>10</sup> there is much quibbling about the exact extent of wasting versus stunting and the precise percentage of children affected. The fact that malnutrition in Sri Lanka is of low severity, in that it rarely reaches the advanced stages where marasmus or kwashiorkor would be evident, leads to complacency about this issue. Regrettably, functional impairment resulting from malnutrition (in physiological, psychological or even social and cultural terms) is often not detectable in the short term and generally only surfaces in the longer term, when it may be impossible to remedy the deficiencies. The costs involved to the state in meeting the health care needs of a population with poor health are generally not considered.

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<sup>10</sup> Ratnayake, R.M.K. and Nestel P.S., "Nutrition and Health of Sri Lankan Children: Results from the First Nutrition and Health Survey," Report prepared by the Nutrition and Poverty Policy Division, Ministry of Policy Planning and Implementation (1993)

Recent studies suggest that resistance to disease, lowered work capacity and job performance, lower endurance rates, reduced cognitive skills leading to poor school performance and poor social skills - all of which are factors in socio-economic success - may be some of the consequences of malnutrition.<sup>11</sup> Due to the difficulties involved in undertaking any longitudinal studies of such side-effects of malnutrition, these factors are largely ignored in Sri Lanka. Yet, studies conducted elsewhere clearly document the long-term costs to effective functioning of poorly nourished children.<sup>12</sup>

The implications of malnutrition for agricultural production and food policy in Sri Lanka also need to be considered. It has been documented, for instance, that countries in which food resources are channelled from the rural to urban areas (as in Sri Lanka), and often exported in large volume to other countries, show mild to moderate malnutrition.<sup>13</sup> Many rural food producers in Sri Lanka subsist on a limited diet, often deficient in protein and essential vitamins. They sacrifice produce which is an important source of vitamins and nutrients because they must channel it to urban markets to meet their cash needs. The implications of this pattern for nutrition deficiencies have yet to be studied.

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<sup>11</sup> *A New Agenda for Women's Health and Nutrition*, World Bank (1994)

<sup>12</sup> Chavez, A. and Martinez, B., *Growing in a Developing Community* (Instituto Nacional de la Nutricion, Mexico City, 1981)

<sup>13</sup> Stavenhagen, R. (ed), "Social Structures of Agrarian Structure in Mexico" in *Agrarian Problems and Peasant Movements in Latin America* (Anchor Books, New York, 1967)

### 3.8 Access to Water and Sanitation

Access to safe water and sanitation has clear health implications. According to 1992 data from the National Water Supply and Drainage Board, safe water is accessible by 53% of households island-wide while 61% of households access adequate sanitation. When these figures are delineated by province, however, sharp disparities between regions appear, as Table 4 below shows. (Data for the North East are unavailable). The rural-urban differences in access are also highlighted in Table 4, with the Western Province showing approximately 75% of households with access to safe water and sanitation, in contrast to Uva and Sabaragamuwa Provinces where only about 30% of households have access to safe water.

**TABLE 4 Access to Water and Sanitation by Province, 1992**

| Province      | % population with access to safe water | % population with access to adequate sanitation |
|---------------|--|---|
| Sabaragamuwa  | 31                                     | 77  |
| Uva           | 34                                     | 67  |
| Southern      | 47                                     | 66  |
| Central       | 48                                     | 64  |
| North Western | 55                                     | 63  |
| North Central | 58                                     | 68  |
| Western       | 73                                     | 78  |

Source: UNICEF general data bases as per NWSDB data collection 1994

The data on the extent of diarrhoeal diseases provided in Table 5 below, on the other hand, suggests that there may be no such clear distinctions between rural and urban areas.

Indeed, given the fact that water sources may be equally unclean in urban and rural settings, albeit for different reasons, such a demarcation is difficult to make. Moreover, since data on diarrhoeal diseases primarily reflect the case load admitted to hospital or receiving outpatient care, and given the high under-reporting of water borne diseases in Sri Lanka, these data are unlikely to represent the full extent of the problem.

**TABLE 5 Water & Sanitation Related Diseases: Number of Cases Notified in 1992**

| Province      | Population | Diarrhoea | Dysentery | Estate<br>Population | Diarrhoea | Dysentery |
|---------------|------------|-----------|-----------|----------------------|-----------|-----------|
| Sabaragamuwa  | 2,821,440  | 235       | 843       | 3,715                | 1,957     | 282       |
| North Central | 835,379    | 849       | 733       | -                    | -         | -         |
| North Western | 1,926,551  | 444       | 798       | 3,789                | 2         | -         |
| Uva           | 923,004    | 383       | 1,389     | 194,550              | 4,848     | 684       |
| Western       | 2,821,440  | 545       | 985       | 3,715                | 36        | 24        |
| Southern      | 1,710,354  | 505       | 1,262     | 22,432               | 71        | 13        |
| Central       | 1,591,402  | 1,613     | 2,503     | 364,055              | 11,938    | 1,440     |

Source: UNICEF general data bases as per NWSDB data collection 1994

#### 4. Education<sup>14</sup>

The Convention Against Discrimination in Education,<sup>15</sup> provides, *inter alia*, conditions for national policy development

<sup>14</sup> See also section on education in Chapter XVI on women's rights

<sup>15</sup> Adopted in December 1960 by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO)

for promoting education in a non-discriminatory manner. Accordingly, the Constitution of Sri Lanka, in the Directive Principles of State Policy and Fundamental Duties, under Article 27(h) defines as an objective of state policy, "the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels."

Sri Lanka's educational system has many achievements to its credit: policies granting free universal education (primary, secondary and tertiary), high enrolment in primary school (nearly 100% admission of the school entering cohort), good school participation rates, teacher-pupil ratios paralleling developed nations (1:24), high literacy rates (88% in 1992), no bias against female education, and free text books (at primary and lower secondary levels).

Indeed from a regional perspective, Sri Lanka has the distinction of faring better than her neighbours in areas such as enrolment of girls in primary, secondary and tertiary education and in literacy.<sup>16</sup> Yet marked disparities in school quality exist between the rural, estate, and the urban sectors. Estate school facilities and achievement rates are deplorable; attrition and repetition rates in the rural and estate sectors are high (see Table 12 below), while competence is remarkably low.

Among other issues, the establishment of effective administration and removal of disparities in educational quality still remain to be achieved. This entails further attention to facilities,

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<sup>16</sup> King, E.M. and Hill, M.A., *Women's Education in Developing Countries: Barriers, Benefits and Policies* (John Hopkins University Press, Baltimore, 1993)

staffing, curriculum and teacher training. Improving teacher skills through sound training needs to go hand in hand with other remedial measures.

The inequities in the educational system date back to the colonial period when a dual system of education prevailed, one with English as the medium of instruction, and the other with vernacular (Sinhala and Tamil) instruction. English medium schools located in urban centres were staffed mostly by Christian missionaries, and were accessible only to the elite. Universal free education was introduced at Independence in 1948. Vernacular instruction was given pride of place with the state take-over of parochial schools. With increasing state support given to vernacular schools, they reached the standards formerly claimed only by the parochial schools. However, insufficient attention to teacher training and the recent intake of a large number of unqualified individuals into the teaching service has contributed to erosion of the quality of instruction.

According to recently available evidence,<sup>17</sup> the positive returns to providing a sound basic education are many. Educational attainment has the potential for yielding high economic returns by improving productivity, which in turn has been known to significantly affect the income levels of the population, as well as their health status. Yet, it would appear from the dwindling budgetary allocations to education that these benefits may have been overlooked. Two decades ago, in 1972, 13% of government expenditure in Sri Lanka was

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<sup>17</sup> Lockheed, M.E. and Verspoor A.M. *et al*, *Improving Primary Education in Developing Countries* (Oxford University Press, Oxford, 1991)



allocated to education. In 1992, this amount had diminished to 9.9 per cent.<sup>18</sup>

Despite universal primary school admission practices (2,027,000 official primary school enrolments in 1992), disparities between rural and urban schools, and between private and public schools, in terms of quality of education, resource allocation, staffing and infrastructure, have resulted in differential quality of education being received by different segments of the society. Figures on attrition rates, discussed below, and the extent of competence are the most telling indicators of this differential access.

Budgetary reductions have exacerbated existing disparities by limiting the much needed allocations to remote, rural and estate schools. Such persistent disparities have for long been neglected. To cite one example, 17% of Colombo schools provide Advance Level (A/L) science education, whereas in Moneragala district only 2.5% of schools do so. Similarly, inequities in the allocation of well trained and qualified staff are widely prevalent. In over 5% of Colombo schools, for instance, the science teachers are graduates, whereas only 2.5% of schools in Ampara and Moneragala districts have graduates on their staff. Such inequities in staffing resources mean that 46% of the Colombo student population have access to science education, compared to only 15.7% of Ampara students. The majority of teachers allocated to rural and estate schools are often untrained and are therefore unprepared to take up the challenge that teaching poses. As Table 6 below shows, the proportion

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<sup>18</sup> *World Development Report 1992* (World Bank, Washington D.C.)

of unqualified teachers outside the Western Province is much higher.

**TABLE 6 Teacher Supply by Province in 1991**

| Province      | % Unqualified Teachers | % Shortage of Teachers |
|---------------|------------------------|------------------------|
| Southern      | 41.45                  | 0.23                   |
| Central       | 39.81                  | 10.88                  |
| North Central | 35.63                  | 9.10                   |
| Uva           | 29.88                  | 12.54                  |
| Northeastern  | 29.40                  | 33.88                  |
| Northwestern  | 27.42                  | 4.59                   |
| Sabaragamuwa  | 26.87                  | 5.61                   |
| Western       | 14.49                  | 8.04                   |

Source: Ministry of Education, Education Statistics Unit

Resource constraints coupled with mismanagement of education leads to a situation where schools may be available, but may be unable to provide good educational outputs. In some cases there are inadequate facilities to house the number of students enrolled. School structures are often dilapidated and badly in need of repair and maintenance. Some school buildings lack desks, chairs, water and sanitary facilities, both for students and teachers. Blackboards may be available when chalk is not, there may be inadequate supply of text and exercise books, there may be no libraries or libraries which are not accessible to the students (for fear of loss or damage of precious material). Poorly designed, outdated and inappropriate curricula and presentation of instructional material leads to low rates of absorption and poor understanding of principles and analytical concepts, leading to an emphasis on rote learning.

#### 4.1 Education, Social Mobility and Tertiary Education

Generally, educational achievement is much sought after in society, precisely because it is one of the most critical prerequisites for social mobility.<sup>19</sup> State provision of universal education at intake (entry into primary school) is, however, contradicted by the limiting factors involved in admission to tertiary education. According to Rodrigo,<sup>20</sup> only 9% of those who sit for the GCE A/L qualifying exam are eligible to gain university admission. Of these, only one-fifth (1.7% of the students sitting for the exam) are actually admitted annually, due to inadequate facilities and resources. A previous study by Gunatilleke<sup>21</sup> indicates that only 1.7% of the cohort, and 1.5% of the population accessing primary school, were admitted to university. Considering the high intake at primary school, these figures are questionably low.

Particularly beginning with secondary education, in response to the keen competition among students to succeed and thereby access tertiary education, a parallel system of private tuition has become institutionalised around the country, and often encouraged by the public school system.<sup>22</sup> The willingness of the public to participate in this parallel system leaves the deficiencies in the public school system

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<sup>19</sup> See Harbison, R.W. and Hanushek E.A., *Educational Performance of the Poor* (Oxford University Press, Oxford, 1992)

<sup>20</sup> Rodrigo, C., "Structural Reforms and the Labour Market, 1977-92: Sri Lanka Case Study" (unpublished report) (Faculty of Graduate Studies, University of Colombo, 1993)

<sup>21</sup> Gunatilleke, G., *The Extent and Nature of the Structural Mismatch in the Domestic Labour Market*, Institute of Policy Studies, Research Studies, Employment Series No. 10 (Colombo, 1989)

<sup>22</sup> *Economic Review*, May-June 1994, contains a series of articles examining various aspects of private tuition in Sri Lanka (People's Bank, Colombo)

unaddressed. The prohibitive costs of this parallel system in monetary terms, and the opportunity costs in terms of the required investment of time and energy, effectively debars the poor from competing in the public school system, and thus from educational achievement and social mobility.

The correlation between low educational status and poverty suggests that the poor attain much less formal education than the non-poor. According to a study conducted by the ADB,<sup>23</sup> 14% of the poor in Sri Lanka were completely illiterate, while 64% had obtained only a primary education (Grade 5 or less). Illiteracy was prevalent in only 2% of the non-poor, with 47% achieving primary school education.

#### **4.2 Literacy: What the Figures Do Not Tell**

Literacy rates in Sri Lanka, estimated at 88% in 1990,<sup>24</sup> are comparatively better than other countries in South Asia and approach those of developed nations. Yet, as the above discussion highlights, the gap in literacy between the poor and the non-poor is indeed large. Literacy rates are significantly lower in the estate sector (66.1%) as shown in Table 7 in comparison with the urban (92.3%) and the rural (87.1%) sectors. The improvement in female literacy rates over the years (55.6% in 1953 and 83.4% in 1990), is particularly impressive, as Table 8 below shows.

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<sup>23</sup> Quibria, M.G. and Srinivasan T.N., *Rural Poverty in Asia: Priority Issues and Policy Options*, Economics and Development Resource Centre (ADB, Manila, Philippines, 1992)

<sup>24</sup> *World Development Report 1994* (World Bank, Washington D.C.)

**TABLE 7 Literacy Rates by Sector 1985/86 and 1992**

| Sector | % Literacy 1985/86 | % Literacy 1992 |
|--------|--------------------|-----------------|
| Urban  | 89.2               | 92.3            |
| Rural  | 84.6               | 87.1            |
| Estate | 60.2               | 66.1            |

Source: Department of Census and Statistics, Labour Force and Socio-Economic Surveys (LFSES)

A word of caution about the reportedly high literacy rates is needed. The methods used to establish literacy rates, and the procedures involved in assessing literacy levels, are flawed even in highly developed contexts. Measures of literacy are often complicated by methodological errors and definitional variations. Literacy counts are prone to problems of over- or under-estimation. Although the difference between basic and functional literacy is well known, the way in which many rapid literacy assessments are conducted leads often to deviations from the norms establishing literacy competence. UNESCO's definition of basic literacy, for example, is the ability to read a few words and sign one's name. Functional literacy is defined as the ability to obtain information from written materials. Deviations from these norms are often adopted for the sake of convenience to facilitate rapid population-wide assessments. Jennings,<sup>25</sup> for example, has observed that there are instances where the ability to read the letters of the alphabet is regarded as literate. Sri Lanka needs to pay further attention to the issues related to establishing literacy levels. The goal should

<sup>25</sup> Jennings, J., *Adult Literacy: Master or Servant?* (University Press Ltd., Dhaka, 1990)

be to improve functional literacy, necessary for the acquisition of new information, which would enhance Sri Lanka's objectives of human resource development.

**TABLE 8 Literacy Rates by Gender**

| Census Year | % Male | % Female | Literate % of the population |
|-------------|--------|----------|------------------------------|
| 1953        | 80.7   | 55.6     | 69.0                         |
| 1963        | 85.6   | 67.3     | 77.0                         |
| 1971        | 85.6   | 70.9     | 78.5                         |
| 1981        | 90.5   | 82.8     | 86.5                         |
| 1990        | 90.5   | 83.4     | 86.9                         |
| 1992        | 90.0   | 83.8     | 86.9                         |

Source: Department of Census and Statistics, Quarterly Report (1992)

### 4.3 Attrition

Despite the state's claim to provide universal education, a high percentage of students exit the education ladder, voluntarily or involuntarily. Attrition occurs when students drop out without completing an education cycle up to Ordinary Level (O/L), or when students performing poorly at O/L leave the system without continuing on to A/L. According to data from the Ministry of Education (1989/90), 4.6% of children reaching completion of the primary school cycle drop out from school. Yet, other sources suggest a larger drop out rate. At least one study of a given school cohort<sup>26</sup>

<sup>26</sup> Gunatilleke, G., *The Extent and Nature of the Structural Mismatch in the Domestic Labour Market*, Institute of Policy Studies, Research Studies, Employment Series No. 10 (Colombo, 1989)



shows that the total attrition rate within the cohort is as high as 90%, following the cycle through all the way to completion of A/L. As Table 9 below shows, attrition occurs in three waves: prior to completing primary school (19.1%), between Grades 6 and 8 (14.9%), at Grade 9 (6%), exiting formal studies after GCE O/L (24.7%), and after the A/L exam (23.2%). High attrition unfortunately means that total net returns to the costs invested in universal education are not realised, as a significant percentage of the cohort drops out prior to completion of 12 years of schooling.

**TABLE 9 Attrition in 1975 Cohort (Population Age 5 yrs in 1975 = 335,000)**

|                                       | School cohort | Percentage |
|---------------------------------------|---------------|------------|
| School admissions in 1975             | 303,000       | 90.0       |
| Children without schooling            | 32,000        | 9.5        |
| Students in Grade 6 of 1975 cohort    | 239,000       | 71.0       |
| Attrition at primary level            | 64,000        | 19.1       |
| Students from cohort in Grade 9       | 189,000       | 56.0       |
| Attrition between Grades 6 - 8        | 50,000        | 14.9       |
| Students from cohort in Grade 10      | 168,000       | 50.0       |
| Students qualifying to take A/L exam  | 85,000        | 25.0       |
| Attrition after O/L exam              | 83,000        | 24.7       |
| Students eligible to enter university | 28,000        | 8.0        |
| Attrition after A/L exam              | 80,000        | 23.2       |
| Students admitted to university       | 5,000         | 1.5        |

Source: Gunatilleke, G., *The Extent and Nature of the Structural Mismatch in the Domestic Labour Market*, Institute of Policy Studies, Research Studies, Employment Series No. 10 (Colombo, 1989)

Attrition, whether voluntary or involuntary, suggests that multiple factors are at play in determining school completion by a given student. Although the data available on this

phenomenon is sparse, one would suspect that attrition is highest in the rural areas and the estate sector. School census data from the Ministry of Education, shown in Table 10, indicates that drop-out rates are highest in the North East. As Table 10 shows, drop-out rates are highest at Grade 5, tapering off at Year 9 (Grade 8).

Extraneous factors such as the withdrawal of older children and adolescents from school during peak periods of the agricultural cycle, and poor health status, which interact negatively with schooling need to be further examined. Endogenous factors such as student motivation, pedagogical tactics, overly lax or harsh disciplinary measures may also contribute to attrition. In a context where enrolment and attendance is often equated with competence, more focus on what is learned, and the learning process itself is badly needed.

**TABLE 10 Drop-Out Rates at Grade 5 by Province, 1989/90, 1991/92**

| Province     | % Drop-outs at Grade 5 | % Drop-outs at Year 9 |
|--------------|------------------------|-----------------------|
|              | 1989/90                | 1991/92               |
| Eastern      | 11.86                  | 1.75                  |
| Northern     | 6.45                   | 10.59                 |
| Central      | 4.23                   | 3.31                  |
| Northwestern | 3.89                   | 4.31                  |
| Sabaragamuwa | 3.86                   | 3.92                  |
| Uva          | 3.74                   | 4.79                  |
| Northcentral | 3.69                   | 4.31                  |
| Western      | 3.67                   | 4.03                  |
| Southern     | 3.28                   | 4.04                  |

Source: Ministry of Education, School Census, 1989/90, 1991/92

**TABLE 11    Average School Avoidance Rates by Sector,  
1987**

| Sector            | Avoidance Rate |
|-------------------|----------------|
| Estate            | 34.7%          |
| Rural             | 11.1%          |
| Urban             | 7.0%           |
| All sectors (Avg) | 17.6%          |

Source: Central Bank, Socio-Economic Achievement 1990

School avoidance data correlate well with the above hypothesis regarding the differential attrition rates between urban and rural schools. Indeed these data, presented in Table 11 above, indicate that school avoidance in the estate sector is alarmingly high, at 34.7% compared to rural areas (11.1%), and urban areas (7%). Data on repetition provides another measure of the differences in access to education between the urban, rural and estate sectors. In this regard, while the repetition rates for O/L and A/L are high for the entire country, those in the estate sector are particularly dismal. As Table 12 below shows, repetition rates in the estate sector during the primary school cycle and through Grade 8 are twice the amount experienced in government schools in the rest of the country. For Years 9 through 13, the percentage of repetition is similar in all sectors.

**TABLE 12 Repetition Rates in All-Island Government and Estate Schools, 1990**

| Grade   | % repetition in<br>Government Schools | % repetition in<br>Estate Schools |
|---------|---------------------------------------|-----------------------------------|
| 1 - 5   | 8.0                                   | 16.2                              |
| 6 - 8   | 4.9                                   | 9.2                               |
| 9 - 11  | 20.6                                  | 19.9                              |
| 12 - 13 | 19.8                                  | 21.4                              |
| Average | 10.4                                  | 15.5                              |

Source: Ministry of Education and Higher Education, School Census.

Data on competence, measured via a standardised test,<sup>27</sup> show that 22.5% of children at primary level in Type 1AB schools failed to pass the test, 50.4% of students in 1C schools failed the test, 67.7% of those in Type 2 schools and 53.5 students in Type 3 schools failed as well (Table 13). The fact that the majority of rural schools are Type 2 and 3 and show significantly higher failure rates further underlines the disparities between urban and rural schools.

<sup>27</sup> As per the national assessments conducted by the National Institute of Education shown in Table 13 (1990)

**TABLE 13 Under Achievement by Type of School**

| School Type | Extent of<br>under achievement | % of<br>under achievers | Total %<br>under achievers |
|-------------|--------------------------------|-------------------------|----------------------------|
| 1AB         | 3 years                        | 5.1                     | 22.5                       |
|             | 2 years                        | 7.1                     |                            |
|             | 1 year                         | 10.3                    |                            |
| 1C          | 3 years                        | 19.9                    | 50.4                       |
|             | 2 years                        | 16.9                    |                            |
|             | 1 year                         | 13.6                    |                            |
| 2           | 3 years                        | 36.8                    | 67.7                       |
|             | 2 years                        | 19.8                    |                            |
|             | 1 year                         | 11.1                    |                            |
| 3           | 3 years                        | 21.7                    | 53.5                       |
|             | 2 years                        | 18.2                    |                            |
|             | 1 year                         | 13.6                    |                            |

Note: Type 1AB refers to schools with classes up to GCE A/L Science  
 Type 1C refers to schools with classes up to GCE A/L with Commerce  
 and Arts  
 Type 2 refers to schools with classes up to Year 11  
 Type 3 refers to schools with classes up to Year 5 or 8 only

Source: Kularatna, Dharmadasa and Dharmawardene, *National Study of Wastage in Education in Sri Lanka 1990*, National Institute of Education

Student achievement in Science and Mathematics at O/L and A/L are equally disappointing. As Table 14 below shows, an alarmingly high percentage of students (averaging 90% at O/L and 78% at A/L) scored less than 50 (out of 100 marks) in standard exams.

**TABLE 14 Student Achievement in O/L and A/L Exams, 1991**

| Type of Exam        | % students scoring above 50 marks |
|---------------------|-----------------------------------|
| O/L Science         | 13                                |
| O/L Maths           | 8                                 |
| A/L Physics         | 17                                |
| A/L Chemistry       | 24                                |
| A/L Botany          | 32                                |
| A/L Zoology         | 18                                |
| A/L Maths (Pure)    | 20                                |
| A/L Maths (Applied) | 23                                |

Source: Balzano, B.A., Report to ADB on Educational Achievement in Sri Lanka (ADB, 1991) (informal)

#### 4.4 Teacher Performance

Sri Lanka currently has a teacher pupil ratio ranging on average between 24 in private schools and 27 in public schools, on par with many developed nations. Yet, the teacher pupil ratio is much higher in rural areas, where there are often as many as 50 students per teacher.<sup>28</sup> In the estate sector, data from the 1990 School Census shows that while the overall teacher pupil ratio for government schools around the island was 1:23, schools in the hillcountry estate areas showed a ratio of 39 pupils per teacher. Moreover, the ratio of students to trained teachers was 49:1 for government schools as compared to 161:1 in the hillcountry. The ratio

<sup>28</sup> See Satharasinghe, A.J., "Women's Participation in Education and its Impact on Development," *Economic Review*, Jan/Feb 1995, pp 41-46



of graduate teachers is even more appalling in the latter area, 905:1 as compared to 103:1 in other government schools.<sup>29</sup> With the anticipated decreases in school enrolment due to the demographic transition that Sri Lanka is presently experiencing, primary school enrolment is expected to decrease by 75,000 students, and secondary school enrolments by 170,000 by the year 2000.<sup>30</sup> Collegiate enrolments, however, are expected to increase by 27,000 by the year 2000. In 1991 there were 10,000 government schools (which by and large provided education for the majority of school goers), 69 private schools and 547 "pirivena" or special Buddhist schools. Approximately 5% of these government schools were Type 1AB schools, 15% were Type 1C schools, 35.8% were Type 2 schools, and 43.9% were Type 3 schools.

In 1993 there were a total of 186,609 teachers serving in government schools, as compared to 135,000 in 1981. Of the entire teaching force in government schools, 25% were graduates, 45% were trained teachers, 3% were untrained certified teachers, and 28% non-graduate untrained teachers. An urban bias in the distribution of qualified teachers similar to that of physicians prevails. According to Satharasinghe, "Qualified teachers are largely concentrated in the developed districts, giving rise to a gap in the quality of teaching between urban and rural areas."<sup>31</sup>

Poor teacher performance is a problem endemic to the education system in Sri Lanka. It stems from several related factors:

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<sup>29</sup> See also Kanapathipillai, V., *A Decade of Change in the Plantations* (International Centre for Ethnic Studies, Colombo, 1992)

<sup>30</sup> National Institute of Education, data bases, compiled for workshop on Teacher Training (unpublished data) (1994)

<sup>31</sup> See *supra* n 28, p 42

the intake of unqualified individuals from the ranks of the unemployed to the teacher service, the overall lack of a policy or practice of providing pre-service training to all teachers as a pre-entry qualification, little in-service training to upgrade teacher skills and subject knowledge, low morale of teachers due to poor salaries, poor working conditions and poor non-salary compensations, the low incentives offered to teachers deployed in remote area schools, the lack of a system of uniform, standardised periodic supervision and evaluations of teachers in the classroom, and the lack of productivity/performance based criteria for salary/cadre up grading.

One of the most foreboding problems haunting the public educational system in Sri Lanka is the high rate of teacher absenteeism. According to a recent study by the National Institute of Education,<sup>32</sup> as many as 25% of teachers are absent for over an average of 30 days of the school year. Much of the absenteeism is experienced in rural schools. The study found, for example, that absenteeism was highest in Polonnaruwa district. The impact of absenteeism on the quality of education, absorption of material, school achievement and attrition is untold. High teacher absenteeism interrupts the flow of lessons, educational continuity and quantum taught during a given school year. Poor supervision and poor governance leads to low accountability of schools to the government and to the public. Teacher performance is not evaluated, therefore, there is no way to assess the quality of the output. Ultimately, the student is blamed for poor absorptive capacity.

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<sup>32</sup> National Institute of Education, *Teacher Attendance Study* (1992)

#### **4.5 Vocational Education and Training**

Vocational training, the seeming panacea for the ills of unemployment ailing Sri Lanka, was offered to school leavers via a number of ministries, under the previous government. Five ministries (Higher Education and University Affairs, Youth, Sports and Culture, Labour and Vocational Training, Policy Planning and Implementation, and Handlooms and Textiles) offered mainstream courses. Another 25 ministries offered primarily in-service and in-plant training to their staff. Under the new PA government, much of the vocational training has been brought under the umbrella of the Ministry of Labour and Vocational Training, except for apprentice training (under the Ministry of Science, Technology and Human Resources Development) and the technical training undertaken by the respective ministries.

Duplication, the lack of standardisation, lack of monitoring, non-responsiveness to industry needs, lack of mechanisms to assess labour market trends, and gender bias in the provision of training have characterised vocational training in Sri Lanka for the past two decades. Under-utilisation of facilities and equipment, outmoded methods of instruction, and lack of evaluation also plagued the system of technical and vocational training, to the extent that the expected outcomes of human resources development have hardly been achieved. More importantly, the training system seldom met its final test, that of employability. Although many of the courses reflected good initial enrolment, high drop-out rates were the norm in much of the training (50% drop-out rate in technical courses offered by the Ministry of Higher Education, 30% in technician training courses offered by the Ministry of Youth, Sports and Cultural Affairs).

## 5. Employment

The right to work (Article 6), and the right to enjoy just and favourable conditions of work (Article 7) are contained in the ICESCR, ratified by Sri Lanka in 1980. While Sri Lanka espouses no policy of discrimination in employment, pervasive inequities within the society effectively debar certain segments of the population from being assured of secure employment, particularly in the formal sector.

A recent study<sup>33</sup> suggests that labour market segmentation may be the major "structural" cause of unemployment. Prywes argues, for example, "The most significant source of inflexibility and of unemployment is probably the division of the labour market into protected, plantation and unprotected segments." Yet, he is quick to note that apart from segmentation, the "web of constraints" faced by the poor may account for the high levels of unemployment among the poor. Among these interrelated set of constraints are, for example, the lack of access to quality education by the poor, the relatively lower educational attainment among the poor as children are pulled out of school to contribute to household income generation activities, poor nutritional status, higher morbidity rates, lack of assets, and poor access to relevant information. Compounding these inequities the poor often face employers' prejudicial notions about work capacity and skills levels.

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<sup>33</sup> Prywes, M., "Unemployment in Sri Lanka: Sources and Solutions," Draft paper, World Bank (1994)

## **5.1 Government Policy on Employment<sup>34</sup>**

The protected segment of the labour market includes about 25% of the work force in Sri Lanka, comprising the civil service, the military, the state enterprises (excluding the plantations) and about 20% of the private sector. Approximately 66% of Sri Lanka's work force is concentrated in the unprotected segment (3.4 million employees in 1992) in agriculture, services and some manufacturing. About 8% of workers (450,000 in 1992) are in the plantation sector. Policies governing wage rates, retirement schemes, and criteria for dismissal provide a good deal of job security in the protected segment of the labour market. Although wage rates for public sector professionals are below those of the private sector, lower grade civil servants receive better compensation, particularly when their non-wage benefits are also considered (i.e. retirement benefits, Employee Provident Fund and Employee Trust Fund, which is estimated as being paid by only about one-third of the private sector employers).

Although the extent to which they cover the work force in the private sector in pragmatic terms is indeterminable, a system of labour tribunals set up in 1957 provides workers in the protected segment protection against unjust dismissal, where issues of worker discipline are concerned. In addition, where economic (non-disciplinary) reasons are concerned, such as anticipated cut-backs in production or closing of a business, the 1971 Termination of Employment of Workmen Act (TEWA) prevents arbitrary dismissal of an employee. According to the TEWA, permission from the Labour Commissioner must be sought prior to such worker dismissal. The TEWA

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<sup>34</sup> See also Chapter X on workers' rights

also prevents an employer from dismissing a worker in such diverse circumstances as prolonged illness as well as worker incompetence. While plantation sector employees are protected by the benefits mentioned so far, overall income levels and poor living conditions reduce the impact of these benefits.

Minimum wage rates in Sri Lanka are generally established by a board consisting of the government, and representatives of labour and management. These rates are published by the Labour Commissioner. The extent to which they are adhered to, enforced, or are violated is difficult to determine. It appears, for example, that women working in home based industries, which are outside the scope of labour laws, suffer wage discrimination. Despite the repeal of legislation in the late 1970s on women being paid less than men, subtle discrimination based on gender contributes to this practice being continued.<sup>35</sup>

## **5.2 Labour Force Participation and Unemployment**

Sri Lanka's labour force amounted to 7 million in 1992. Approximately 63% of the labour force in 1992 was male, 37% female. Female labour force participation rates have doubled during the 30 year period between the 1960s (20%) and the 1990s (39%), while the male labour force participation rate has remained more or less stable (67%).<sup>36</sup>

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<sup>35</sup> Rice, C. and Wilber, J.E., *Childcare Needs of Low Income Women in Rural and Urban Sri Lanka*, League of Women Voters, Overseas Education Fund in collaboration with the Sri Lanka Federation of University Women (1979)

<sup>36</sup> Department of Census and Statistics, *Labour Force Survey 1992* (Colombo, Sri Lanka)



The problem of worsening unemployment has beleaguered the Sri Lankan Government since the 1960s when there was a sharp rise in unemployment from 7.7% in 1963 to 18.7% in 1971.<sup>37</sup> Consumer Finance Survey (CFS) data shows a drop in unemployment to 11.7% by 1982. By 1985, unemployment was estimated to have risen to 14.1%, with a further increase to 18.5% by 1990.<sup>38</sup> In 1993, the estimated unemployment rate was approximately 13.8 per cent.

The distinguishing features of unemployment in Sri Lanka are:

- (1) the prevalence of predominantly youth unemployment
- (2) the long duration of unemployment (48% unemployed over 12 months (CFS))
- (3) the high educational qualifications of the unemployed
- (4) high percentage of women unemployed
- (5) high percentage of female educated unemployed
- (6) much of the unemployment being an urban phenomenon
- (7) the persistence of underemployment in rural areas

### **5.3 Unemployment and Labour Market Discrimination**

High youth unemployment, as shown in Table 15 below, is a critical problem facing Sri Lanka.<sup>39</sup> The extent to which there may be overt or covert discrimination in the

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<sup>37</sup> An alternate source, the Consumer Finance Surveys show 14% and 24% respectively for 1963 and 1973

<sup>38</sup> LFSES

<sup>39</sup> Department of Census and Statistics, *Labour Force Survey 1992* (Colombo, Sri Lanka)

labour market may be most evident from these unemployment statistics. Disproportionately higher female (20.8%) as compared to male unemployment (10.8%), and higher unemployment of educated females (44.9% of women with A/L, as compared to 18.7% of men with A/L) suggests that youth and women are not accessing basic provisions in employment.

**TABLE 15 Unemployment Rates 1993 by Age and Gender**

| Age      | % Female | % Male |
|----------|----------|--------|
| 15 - 19  | 33.5     | 32.5   |
| 20 - 29  | 67.4     | 40.3   |
| 30 - 39  | 26.4     | 10.4   |
| 40 - 49  | 16.0     | 6.1    |
| 50 - 59  | 5.7      | 0      |
| All Ages | 10.2     | 21.0   |

Source: Department of Census and Statistics, *Labour Force Survey 1992* (Colombo, Sri Lanka)

An often unknown aspect of unemployment is the patronage required by custom in securing employment. Although formal recruitment to public sector jobs for the most part appears to be equally assured through island-wide competitive exams, trade tests and viva voce procedures, parallel informal practices contradict the impartiality of these procedures. The often unspoken of, seldom acknowledged aspect in obtaining work is political patronage, patronage by the powerful or by the wealthy and those well positioned in society. Transparency and equity in hiring practices are undermined by both nepotism and the continuation of such feudal patron-client relations. Coupled together, these two practices essentially mean that hiring for a given job is not always strictly on merit and

qualifications alone, but sometimes on "connections" as well. The inequities perpetuated by this insidious system of discrimination has contributed to the frustrations of the youth in Sri Lanka.

Gender discrimination in employment, on the other hand, frequently occurs as a result of certain deep-rooted social and economic forces. On one hand, age-old biases which are often not consciously contrived, based on myths governing women's competence and capacities, limit women's employment opportunities (in terms of occupational level, level of responsibility and remuneration). Women's own notions of what constitute "high status" or "respectable" jobs based on their internalised gender norms delimit their wider employment opportunities. These gender based occupational stereotypes held both by employees and employers may in part contribute to the higher unemployment rates of educated women.

Discrimination is prevalent in another way, however, in the gender based occupational structure. In all three segments of the labour market, for the most part, managerial and supervisory roles (junior, middle and senior) are assumed to a large extent by males. A study by Gunawardena<sup>40</sup> revealed that in "professional and related occupations," although the number of men and women employed were the same, only a few women occupied administrative and managerial positions. Wage discrimination, particularly at the lower occupational grades, appears to be uneven, but continues in some sectors.<sup>41</sup> Discrimination occurs also when positions

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<sup>40</sup> Gunawardena, C., "Women in Higher Education in Sri Lanka," *Higher Education Review* 19 (1987) pp 8-23

<sup>41</sup> See *supra* n 35

of responsibility are disproportionately held by men. In the garment sector, for example, despite the predominance of women workers, a larger percentage of the wage bill was incurred by men.<sup>42</sup>

#### **5.4 Educational Attainment and Employment**

Lower educational attainment due to a host of factors associated with poverty, regional disparities, differential quality of schools between urban and rural areas, and high teacher absenteeism in remote schools limit the social mobility of the poor and rural population, reproducing the traditional socio-economic divisions of the society generation after generation. The high percentage (32%) of GCE A/L young adults who are unemployed and 22.3% of GCE O/L among the unemployed suggests that there are difficulties that many a new entrant to the labour market faces.

The higher aspirations of better educated youth for secure, remunerative, higher status public service positions may account for the longer wait in searching for a job. The private sector and industry's preference for young adults with slightly different skills and background profile than the average A/L young adult may, on the other hand, exacerbate the problem. Underemployment, on the other hand, appears as an increasing pattern with economic pressures compelling more and more young adults to accept employment beneath their educational qualifications.

Yet, even in public service the low intake of females is quite apparent. As Table 16 below shows, in 1979, female

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<sup>42</sup> See *supra* n 20

**TABLE 16 Female Employment in the Sri Lanka Administrative Service**

| Grade              | % Female<br>1979 | % Female<br>1984 | % Female<br>1988 | % Female<br>1992 |
|--------------------|------------------|------------------|------------------|------------------|
| Class I            | 1.8              | 3.7              | 6.7              | 17.5             |
| Class II, Grade I  | 5.5              | 14.4             | 21.5             | 11.0             |
| Class II, Grade II | 9.2              | 12.1             | 16.1             | 10.9             |
| Total              | 7.6              | 11.7             | 16.0             | 11.8             |

Source: Department of Public Administration, Annual Reports (Colombo, Sri Lanka)

**TABLE 17 Percentage Female Employment in the Public and Corporation Sector by Occupation, 1980, 1985, 1990**

| Occupation   | % F 1980 | % F 1985 | % F 1990 |
|--|----------|----------|----------|
| Professional, technical & related                              | 56       | 46.8     | 13.5     |
| Administrative/managerial                                      | 12       | 12.9     | 11.1     |
| Clerical and related   | 17       | 27.6     | 34.5     |
| Sales  | 36       | N/A      | N/A      |
| Service  | 3        | N/A      | N/A      |
| Agriculture, animal husbandry, forestry, fisheries and hunters | 15       | 11.1*    | N/A      |

Note: Due to the incompatibility of census data available for the three different survey years (1980, 1985 and 1990), the following adjustments have been made:

- (1) For 1985 professional, technical and related, census data enumerating engineers and related technical workers and medical and related have been used
- (2) Also for 1985 and 1990 no data has been provided on the percentage of women in sales, service and agriculture etc. and related fields

\* except for 1985 where only the number of agricultural workers has been identified

Source: Department of Census and Statistics, 1980, 1985, 1990

employment in the Sri Lanka Administrative Service (SLAS) employees in Class I and II averaged less than 8%, while their number had increased to an average of 11.7% in 1984. In 1992, female employment in SLAS averaged 11.8 per cent.

### 5.5 English Skills and Employability

Mastery of English has for long been a prerequisite for success in post-colonial Sri Lanka. The internalisation of colonial notions of superiority associated with knowledge of English by the upper strata of society has also contributed to the unemployment divide. The post-1956 Sinhala Only legislation did much to reverse gains in English competence by the rural masses. These two convoluted processes, one the post-colonial identification of English skills with general competence, and two, the violent rejection of English and all colonial trappings by nationalists, together have led to the skewed nature of employment intake.

### 5.6 Vocational Training and Employment Preparation

Vocational training programmes in Sri Lanka are not tailored towards demands from industry. They are not responsive to the needs and skills mix required by industry and areas of investment growth. A study by Gunatilleke<sup>43</sup> suggested that there was no *structural* mismatch problem in Sri Lanka. However, mismatch occurs in several ways as Gunatilleke

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<sup>43</sup> Gunatilleke, G., *The Extent and Nature of the Structural Mismatch in the Domestic Labour Market*, Institute of Policy Studies, Research Studies, Employment Series No. 10 (Colombo, 1989)



suggests: one, from the imbalance between higher labour force participation by a better-educated work force and the type of work available in the labour market; two, occupational mismatch where the skills of the work force are irrelevant to the needs of industry; and three, the mismatch between aspirations ("profile of expectations" as Gunatilleke calls it) and the occupational profile.

Preparatory work presently being done on the Vocational and Technical Training Reforms project indicates that there is a skills gap between the work force and the type of skills required for industrial growth in Sri Lanka, primarily because of irrelevant or poor quality training. There is no mechanism at present for industry to feed information on their requirements to training authorities, policy makers and relevant institutes in order to make training more responsive to their needs. According to Gunatilleke, approximately 23% of the average cohort leave school before reaching Grade 10, and without any skills or certification that would ease their entry into the labour market.

The government now runs an array of vocational training programmes that are intended to upgrade the skills of school leavers, but they are not responsive to demands by industry. In fact these training programmes are not even structured along the lines of labour market trends. They are not informed by Labour Market Information Service (LMIS) or tracer studies, and do not evaluate their training programmes nor follow-up on the fate of the trainee. Therefore much work has to be done.

As Table 18 below shows, female enrolment in technical institutes has more than doubled in the decade between

1973 and 1984, and more than tripled by 1992. Yet, overall student enrolment for technician's certificates in 1984 numbers less than one-third the enrolment rate in 1973. It is interesting to note also the increasing female enrolment for the National Diploma in Technology. Also significant is the increase in the number of students enrolling for English certificates.

**TABLE 18 Percentage Female Enrolment in Technical Institutes 1973, 1984 and 1992**

| Course                          | % F 1973 | % F 1984 | % F 1992 |
|---------------------------------|----------|----------|----------|
| National Diploma in Technology  | 7.7      | 19.0     | 25.4     |
| Technical Certificate           | 5.5      | 9.0      | 15.0     |
| Draughtsman Certificate         |          | 53.0     | 54.0     |
| Technical trades                | 0.5      | 0.6      | 0.2      |
| Crafts                          | -        | 50.0     | 6.0      |
| Tailoring                       | -        | 48.0     | 83.0     |
| Home Science                    | -        | 100.0    | 100.0    |
| Agriculture                     | -        | 22.0     | 28.0     |
| Business & Commerce Diploma     | 32.0     | 44.0     | 53.5     |
| Business & Commerce Certificate | -        | 71.0     | 72.0     |
| English                         | 30.0     | 53.0     | 59.0     |
| Total                           | 15.0     | 37.0     | 45.1     |

Source: Ministry of Education and Higher Education: Technical Education Branch

### 5.7 Export Processing Zones (EPZs)

The initial impetus drawing a higher percentage of women into the industrial labour force came in the decade between 1956 and 1965, a period of rapid growth in import substitution industries. Employment opportunities opened up for women

in several manufacturing industries such as handloom, powerloom and synthetic textiles, plastic and leather goods, toys, electronics, and ceramics. In quantifiable terms, women wage workers formed 18.5% of the total work force in 1953, while by 1971 their participation had risen to 81.6% in these sectors. The labour force participation rate for women in 1980/81 was 25.8% and 33.3% in 1993.<sup>44</sup>

The second wave of industrial expansion came with the opening of the Investment Promotion Zones in the late 1970s. By 1983, 52 export oriented industries were operating in the Katunayake FTZ, 56% of which were garment factories, employing singularly, if not primarily young women. By 1986, the total number of factories operating in the FTZ had risen to 77, with 38% (29 factories) being garment industries. Of the total labour force working in these 77 factories, 79% was female (28,414 women), 93% employed in the manufacture of textiles, wearing apparel and leather goods. Males comprised 21% of the labour force in these 77 factories. Thirty eight per cent of these males were employed in the manufacture of textiles, clothing and leather goods, 33% by AirLanka, 7% in chemical industries, another 7% in service related industries, 3% in non-metallic mineral products manufacture, 2% in fabricated metal machinery industries, and approximately 10% in miscellaneous other manufacturing industries. Women outnumbered men in each of these areas significantly, except in AirLanka (29.5% female), fabricated metal machinery (15% female) and in

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<sup>44</sup> Alailema, P., "Education Employment Linkages: The Macro Profile," *Sri Lanka Journal of Social Science*, Vol. 15 (1992) pp 1-45; and Department of Census and Statistics, *Labour Force Survey 1992* (Colombo, Sri Lanka)

services (3% female). In 1992, the bulk of the EPZ labour force (78.2%) remained young and female.<sup>45</sup>

Employers' preference for young female workers also enhanced women's opportunities in the labour force, particularly in the EPZs. A study of female employment in the FTZs<sup>46</sup> showed that 96% of the women employed in the FTZ were below 30 years of age, the majority (76%) aged 16 to 25, while 98% were unmarried. The preference for a young female labour force by industry, because of their "docility" and "compliance," as well as their presumed ambidexterity, has been documented throughout South and Southeast Asia (72% of women surveyed obtained their jobs as a result of political patronage soon after the Greater Colombo Economic Commission (GCEC) was created).

## 5.8 Unemployment Aspirations Versus Poverty

There appears to be increasing unemployment in the rural sector as Table 19 below shows, which could be related to the corresponding evidence of poverty. Rising costs of living and the inability for many households in the lower income brackets to manage on one person's earnings has compelled more young women to join the labour force. Whereas traditional notions about women's employment may have deterred them from joining the labour force, the breakdown of social constraints relating to women's employment, delayed

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<sup>45</sup> Kelly, T., "Trends and Outlook for Sri Lanka Labour Markets" in *Human Resource Development Review*, Human Resource Development Council (Colombo, 1994)

<sup>46</sup> Goonetilleke, H. and Goonesekere, S., "Daughters in Industry," Report published by CENWOR (Colombo, Sri Lanka, 1986)

age for marriage coupled with increased opportunities for employment presented by the growth in industry, have led to high labour force participation rates by women. Nonetheless, poverty appears to be the foremost compelling force that has led to this phenomenon.

**TABLE 19 Unemployment as a Percentage of the Labour Force by Sector**

| Sector | % 1978/79 | % 1981/82 | % 1985/86 | % 1990/91 |
|--------|-----------|-----------|-----------|-----------|
| Urban  | 20.7      | 14.2      | 19.5      | 18.4      |
| Rural  | 14.6      | 12.0      | 13.2      | 15.9      |
| Estate | 5.6       | 5.0       | 7.8       | N/A       |

Source: CFS 78/79, CFS 81/82 and Department of Census and Statistics

According to a 1986 study of FTZ female workers (of whom 68% were O/L or A/L qualified), 96% of the women workers reported that factory work was sought only as a last resort to ward off poverty. Lack of alternate employment opportunities compelled them to join the FTZ labour force, because it provided at least a semblance of dignity over casual labour and food vending, the only other options open to them. Women in the upper income strata with A/L qualifications, however, desired "respectable" jobs and were not interested in jobs that entail technical skills. The other side of the coin, however, is that the general nature of their qualifications (up to A/L) provides them with few marketable skills.

Family income data from the study by Goonetilleke and Goonesekere<sup>47</sup> which showed that 54% of the families concerned earned below Rs. 700 per month confirms our hypothesis about the correlation between poverty and higher female employment. Eighty two percent of the families' occupational background was either landless agricultural labour, casual labour, lower level salaried labour in public service or subsistence farmers. These data further confirm the force of poverty as a "push" factor in drawing more women than before into the labour force. Similarly, the study reports 74% of the families of women working outside the EPZ belonging to either landless agricultural, casual and salaried labour (60%), and subsistence farming (14%) occupations.

The same study showed that 8% of women workers were the primary income earners of their households. Ninety per cent of the families had one or more household members searching for work. The pattern of remittances to the natal family is also indicative of the dependence on the working woman's salary by the natal household, further confirming the poverty hypothesis in pushing women into the labour force. Seventy per cent of the women surveyed remitted home over half of their savings, while 14% remitted 100% of their savings. Outside the EPZ, 60% of the working women surveyed remitted home 100% of their savings. The study notes that "nearly half of the young women living with their parents handed over their entire wage packet to their mothers and received in return their daily travelling and miscellaneous expenses."<sup>48</sup>

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<sup>47</sup> *Ibid*

<sup>48</sup> *Ibid*, p 201



## **5.9 Ethnic Stratification in Employment**

The process of ethnic stratification in the employment and occupational structures of Sri Lanka has been little examined. It is most obvious in the estate sector where the labour force is predominantly Indian Tamil (82%). Their lack of Sri Lankan citizenship until recent times has hampered their ability to move out of the estate enclaves. As a minority group with a distinct religious, cultural and language tradition, their integration with the larger society has been constrained.<sup>49</sup> The movement of this population out of the estate sector, and in parallel the movement of Sinhala villagers into the estate sector, has occurred since the signing of the Sirima-Shastri Pact of 1964 granting citizenship rights to a portion of the Indian Tamil population.

Yet their predominance in the informal sector outside the estate sector, primarily in low remunerative, low-status occupations such as cobblery, street cleaning and hauling of garbage, suggests the complex issues related to their occupational mobility. Moreover, the lower literacy, educational and health indicators evident for this population calls for urgent remedial measures.

## **5.10 Summary**

Labour market discrimination, along gender, ethnic, or socio-economic origin lines, and whether overt or covert, intentional or not, has numerous negative consequences. Cross-country studies indicate that labour market discrimination may in

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<sup>49</sup> See *supra* n 29

fact lead to overall inefficiency by causing decreased output and productivity.<sup>50</sup> It may also limit intergenerational mobility, underlining and perpetuating the existent income inequities. Finally, it may contribute to frustration, antagonism and social conflict. As Birdsall and Sabot argue, "There is an additional cost to discrimination. By exacerbating current inequality between groups, by contributing to its perpetuation from one generation to the next, and by ensuring that at least a component of that inequality is rooted in injustice, discrimination may foster conflict."<sup>51</sup> If there are perceptions among the economically disadvantaged groups that positive or negative discrimination occurs along ethnic or religious lines, it may further exacerbate tensions between them.

## 6. Conclusion

The foregoing discussion has focused on the key issues related to the right to an adequate standard of living, namely, health, education, and employment. An attempt has been made to disaggregate national level data on socio-economic conditions on a regional, sectoral (urban/rural/estate) and gender relevant basis, in order to obtain a clearer profile of the differences in the living conditions - i.e., the extent to which certain socio-economic rights are realised - for each group of people.

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<sup>50</sup> Birdsall, N. and Sabot, R. (eds), *Unfair Advantage: Labour Discrimination in Developing Countries*, World Bank Regional and Sectoral Studies (Washington D.C., 1991)

<sup>51</sup> *Ibid*, p 7

## **XII**

# **Minority Rights and the Ethnic Conflict**

### **1. Introduction**

International focus on the rights of minorities rose as a result of the growing phenomenon of ethnic violence, internal armed conflicts and human rights abuses associated with such conflicts. Such conflicts have most often erupted with cries for the right to preserve the identity of the minority community, and to determine its political, economic, social and cultural development. The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Minority Rights Declaration) came into being in December 1992 as a recognition of the need to ensure the protection of the rights and freedoms of minorities within states. The protection and promotion of minority rights in a multi-cultural society is also necessary to sustain political and social stability which enables economic stability and development.

Sri Lanka continued to experience in 1994 the consequences of its mismanagement of its ethnic struggle as the violent conflict between the government and the LTTE persisted. The UNP government which was in power until August

demonstrated an inability or unwillingness to rise above ethnically antagonistic politics. The PA led by Chandrika Bandaranaike Kumaratunga acknowledged the existence of an ethnic problem in Sri Lanka in contrast to President Wijetunga's assertion that Sri Lanka had a terrorist problem and not an ethnic problem, signalling a break from the rhetoric of the past. The policy direction of the new government in relation to the minority groups in the country was proclaimed by President Kumaratunga in her Policy Statement at the opening of parliament thus:

*We have a vision for Sri Lanka where all communities can live in safety and security, where human dignity is valued, and equality of treatment an accepted norm of public life. We believe that all communities must be given the space to express their identity and to participate fully in the life of the nation, whether it be at the national, provincial, or local level.*

The Sri Lankan population is made up of several linguistic and religious groups. According to the most recent census undertaken in 1981, the composition of the population of Sri Lanka is as follows: 74% comprise those who speak the Sinhala language (known as the Sinhalese); the 18.22% Tamil speaking population comprise 12.7% Sri Lankan Tamils and 5.5% Hill Country Tamils; 7.37% Muslims; and small percentages of Malays, Anglo-asians and others. Sri Lanka is not only a multi-ethnic country, it is also home to many of the world's major religions: 69% of the population are Buddhist; 15.48% are Hindu; the Muslims and Malays are followers of Islam comprising close to 8%; and the Christians, who comprise Tamils and Sinhalese, total 7.6%

of the population.<sup>1</sup> Most Buddhists are Sinhalese, while most Hindus are Tamil.

Besides language and religion, certain cultural practices and traditional norms serve to distinguish the Sinhalese, Tamils and Muslims. Although considerable commonalities in culture and tradition prevail among these groups, these commonalities, unfortunately, have become submerged in their nationalistic politics. Geographically, the North is predominantly populated by Sri Lankan Tamils; the East comprises 32% Muslims, 43% Tamils, and 25% Sinhalese. In the South of the country, the western and central provinces have a multi-ethnic population while the other southern provinces are predominantly Sinhalese and Buddhist.

Sri Lanka's legal obligations to protect the rights of minorities stem from international and domestic sources. In the domestic sphere a certain amount of protection is granted by the Constitution of Sri Lanka. Although the Sri Lankan Constitution does not have any specific minority protection provisions, it prohibits discrimination based on race, religion, language, caste, or place of birth and stipulates that everyone is equal before the law. In addition, the 16th Amendment provides for the right to use Tamil in all official transactions and communications.

In the international sphere, the ICCPR, the Minority Rights Declaration and the ICESCR set the international standards which State Parties are obligated to implement at the domestic level. The rights protected by the international instruments

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<sup>1</sup> *Statistical Pocket Book of the Democratic Socialist Republic of Sri Lanka* (Department of Census and Statistics, 1993)

include the enjoyment of own culture; practice of religion; use of own language in private and public and to be educated in that language; the right to participate in the social, economic and public life, and to participate fully in the economic progress and development of their country.<sup>2</sup>

The underlying grievances of minorities in Sri Lanka have converged around the issues of statelessness, language, education, devolution of power, and recruitment to the public sector. The 13th Amendment to the Constitution which sought to provide the legal framework for implementation of the Indo-Lanka Accord not only proved inadequate to address these problems, but also was not implemented properly. The North East remained devastated by the war in 1994. The large scale destruction of the East had for the most part ceased and an uneasy sense of normalcy prevailed. However, the destruction of the North continued during the first half of the year with churches, schools and hospitals damaged by bombing, and the economic embargo further exacerbating the difficulties faced by civilians in the North. Following the assumption of power by the new PA government the embargo was relaxed and direct talks established between the government and the LTTE.

This chapter will examine developments relating to the rights of minorities during 1994 including new policy direction and institutional developments relating to minorities. Considering that 1994 was an election year, and that the new government had been in power only for a short time by the end of the year, it is hoped that the issues highlighted

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<sup>2</sup> For a detailed discussion on the international standards relating to minority rights see *Sri Lanka: State of Human Rights 1993* (Law & Society Trust, 1994)



in this chapter will soon receive appropriate and adequate policy and institutional responses.

## **2. Right to Use Own Language in Public and Private**

Tamil is spoken by three groups in Sri Lanka: the Sri Lankan Tamils, the Muslims, and the Hill Country Tamils. Together they make up about 25% of the population of Sri Lanka. Although a majority of Tamil speakers live in the North, East and Central Provinces, a large number of Tamil speakers live in the Western Province, which along with the Central Province make up the two multi-ethnic provinces in the South.

The right of Tamil speakers to use their language in transacting business with the state was incorporated into the Constitution via the 13th Amendment pursuant to the Indo-Lanka Accord of 1988 which sought to address one of the major issues of contention since the Sinhala Only Act of 1956. The recognition accorded to Tamil "also" as an official language in the amendment, even though it denied an equality of status to Tamil and Sinhala, mandated the use of Tamil in official transactions. In practice, however, the problems faced by Tamil speakers in this area included: receipt of government communications in Sinhala, inability to communicate either in writing or verbally in Tamil, inability to fill forms in Tamil, inability to file cases in court in Tamil, untold delays in the conduct of trials due to the dearth of interpreters from Tamil to Sinhala and unavailability of translators, the need to sign police entries written in Sinhala without being provided a translation. In cities with a large number of Tamil speaking persons such as in Colombo

and Kandy, the destination boards of public transportation, and public signs are most often only displayed in Sinhala, or in Sinhala and English. Even at universities with a large number of Tamil students, many signboards and directions remain in Sinhala only.

In 1994 the Government of Sri Lanka presented its country report under Article IX of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) to the United Nations Committee on the Elimination of Racial Discrimination. According to this report the Official Languages Department had taken the following steps to implement the constitutional provisions relating to language:

- (1) Directed all literature and sign boards to be in all three languages;
- (2) Taken the initiative to teach Tamil to Sinhala speaking public servants and Sinhala to Tamil speaking public servants and English to all, through its programme "Peace through Language;"
- (3) By circular No. 25/89(1) of 1989, it required all government bodies to reply to all correspondence received in the language of such correspondence; and
- (4) Launched a programme to educate the public of their right to use their mother tongue in all correspondence.

What the report failed to mention was that despite the directive, government literature and sign boards have remained only in Sinhala and no action had been taken to ensure compliance by all governmental bodies. In addition, circular No. 25/89(1) requiring all government bodies to reply all

correspondence received in the language of such correspondence continues to be unheeded. It is a common occurrence for Tamil speakers to have to seek those proficient in Tamil and Sinhala or Sinhala and English to translate government communiques for them. Confidence in the Official Languages Commission, which was set up to enforce the language policy, was low. According to an official at the Official Languages Department, very few complaints were made to the Commission in 1994 due to perceptions that the Commission was ineffective. Moreover, no programme was undertaken in 1994 to educate the public on their language rights.

The Official Languages Commission was rather ineffective in implementing its mandate in the period prior to September 1994. This was partly due to the lack of political will, and because it had virtually no access to resources. The Commission was viewed as an extension of the Ministry of Public Administration; staff of the Commission were chosen by the Ministry and seconded to the Commission. The law, however, envisaged that the Commission would be an autonomous statutory body.

Although in principle the Commission was to have control over its finances, in practice funds were under the control of the Ministry of Public Administration. Although parliament had voted Rs. 3.6 million for the implementation of the Official Languages policy, over the last several years only about a million rupees had been spent, and that too mostly on salaries.

The public was for the most part ignorant of the Commission, its mandate, function and authority. The only attempt at publicising the Commission was a two page advertisement

in 1991. Since then no attempt has been made to create awareness in the public of the recourse they have when unable to exercise their constitutionally guaranteed right.

Subsequent to the assumption of office by the new government, the composition of the commission was changed. The current Commission members seem to be seriously committed to execute their mandate. The new Commission intends to establish its autonomy from the Ministry of Public Administration by transferring funds into the Commission's control and hiring its own staff. It intends to launch a campaign to inform the public of their rights and invite representations from them. The implementation of the Official Languages policy would be undertaken through a three year phased programme. The three year programme will initially target departments and institutions which transact business with the public and which are situated in areas of mixed populations. Resources would be concentrated in these areas and sectors first, to implement the programme which seeks to equip these departments to adequately respond to the language needs of the public.

### **3. Right to Education**

The right to education of the minorities was severely circumscribed in 1994. Schools had been bombed in the North, and in the East they deteriorated due to neglect. The economic blockade caused severe shortages of necessary materials for schools in the North. Even exercise books were not available at times. Among the items banned by the UNP government were exercise books, stationary, school bags, black board paint, and lab equipment. Even after the lifting of the ban by the current government, these

items were not getting beyond Vavuniya in sufficient quantities.

What was most disturbing was the lack of teaching staff, especially in the "uncleared" areas. The Ceylon Tamil Teachers' Union stated in its Memorandum for Discussions with Hon. Richard Pathirana, Minister of Education on 13 February 1995 (hereinafter the CTTU Memorandum) "A special examination was held on 31 December 1994 to recruit teachers for North East. We request at least 3,500 candidates be selected to fill the vacancies as there are more than 7,000 vacancies." The war had displaced many teachers. However, even those who applied to fill the vacancies were not hired. For example, about 30 candidates applied for the posts of technical teachers. Letters requesting them for interviews were delayed in the mail. When the candidates appeared for the interviews they were told that the posts had been filled. The CTTU Memorandum notes that "since 1990 the number of Teachers in other provinces has gone up, whereas in the North the number of Teachers has come down." The CTTU attributes "the poor management of education service of the Tamil Schools throughout the Island at all levels" to the "big vacuum in the SLEAS [Sri Lanka Educational Administrative Service] cadre of Tamils."

The National Institute of Education (NIE) also does not employ sufficient Tamil officers to administer the Tamil medium work. The CTTU Memorandum describes the process of training projects thus: "It has been the practice in the past that the projects are started in the Sinhala medium first and then translated into English and subsequently into the Tamil medium. This results in Tamil medium projects starting much later than the Sinhala medium, thus denying

equal opportunities to Tamils and Muslims." In addition, among the list of 14 courses provided by the NIE, only three of these courses were available in the Tamil medium. In addition, except for two of these courses, the others were not even administered anywhere in the North East. The only other course provided in Tamil is administered in Colombo. The practice of the NIE thus constitutes *de facto* discrimination against the Tamil-speaking community by denying them access to educational training programmes in Tamil in violation of Article 12(2) of the Constitution which states that, "No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any such grounds." Besides, Article 21(2) of the Constitution states that "Where one National Language is the medium of instruction for or in any course, department or faculty of any University directly or indirectly financed by the State, the other National Language shall also be made a medium of instruction for or in such course, department or faculty..." For the purpose of this Article, university includes any institution of higher learning, and this principle should therefore be applicable to the NIE.

Due to the long neglect of the needs of the plantation areas, education in the hill country has been handicapped by a shortage of teachers, compounded by an acute shortage of well qualified teachers. The failure of the state to provide adequate access to education for the Hill Country Tamils has contributed to their confinement within the plantation economy.

As of July 1994, employees of the Education Department in the North East had not been paid their Incentive Allowance for the period 19 June to 19 December claiming a lack



of funds, whereas employees in all the other government departments had already been paid. There are severe delays in the publication of school books and teachers' guides in Tamil. According to the CTTU, "Due to lack of Tamil officers, Tamil medium books and course guides, etc., are not distributed at the same time as Sinhala medium, thus denying equal opportunities to Tamils and Muslims in education." In addition, outside the North some supposedly Tamil medium schools are without even one Tamil speaking teacher, thus directly violating the right of an individual to receive education in his or her mother tongue. Such a situation is most often faced by the Hill Country Tamil students, especially in the Southern areas, where schools for Hill Country Tamils are administered by non-Tamil speaking principals and staffed by non-Tamil speaking teachers.

Access to higher education has been another crucial area where Tamils have experienced direct discrimination in the past and indirect discrimination at present. The government's stated policy is not to discriminate. In practice, however, Tamil students, especially in the North, have been adversely affected. The University Grants Commission increases the number of seats for each faculty in all the universities each year. However, since 1990 no increase of seats has been instituted for any of the faculties at the Jaffna University. In addition, as the CTTU Memorandum indicates, the Jaffna University operates well below capacity.

Since the outbreak of hostilities in 1990 the students in the North East have had to face untold hardships, especially in the North. The danger and disruption to their lives caused by the war is common knowledge. Students have had to avoid the frequent shelling and aerial bombardment

and study in classrooms which were partially destroyed by the war, without access to even the basic necessities. In addition to the absence of electricity they often lack access even to oil for lamps, and are compelled to study by daylight. In addition, due to the incessant disruption caused by the war they are unable to complete the syllabus.

#### **4. Health**

Health care related problems in the North East are two fold. Firstly, there has been an increase in health problems, and secondly, there is a lack of health care personnel and medical supplies.

Health problems of the population increased due to malnutrition and environmental degradation, breakdown of sanitary infrastructure, and physical and mental trauma. The population in the North has suffered from a variety of infectious diseases, including malaria and cholera. Common diseases in the region during the year were malaria, typhoid, septicaemia and cholera. Dr. K. Velauthapillai, Senior Lecturer in Microbiology, North Colombo Medical College, has identified the micro-organisms causing septicaemia in children under 10 years of age, and has noted that this micro-organism affects only those who are malnourished. According to the paediatrician of the Jaffna General Hospital, 50% of children admitted are malnourished and a high percentage of these children die as a result of fever and chills. During the first three months of 1994 alone 68 children died of septicaemia in Jaffna's hospitals. Another type of septicaemia affected all age groups. The shortage of drugs which could effectively counter this disease was one of the reasons behind

the deaths of those afflicted with this disease. In addition to the shortage of drugs, the inadequacy of laboratory facilities and trained personnel to culture blood and diagnose the disease prevented timely treatment, resulting in death. The unsanitary conditions in refugee camps, the break down of the sewage system due to war damage and neglect, the discontinuance of treatment for malarial mosquitos, have contributed to the health woes of the population in the North.<sup>3</sup>

There is more than one reason for the lack of medical practitioners and health service personnel. Firstly, the civil war has caused the flight of a large number of medical practitioners including doctors and nurses. The second reason is far more subtle: the repercussions of systemic bias in government educational policy and practice are being felt now. The gradual decrease in the number of Tamil speaking people admitted for training in health related services, training courses offered only in Sinhala, and promotion exams conducted only in Sinhala have produced the current dearth of Tamil health service personnel in the Tamil speaking areas. Very few Sinhala health personnel are willing to work in the North East, which is understandable, in the current context. Even the only two schools for basic nursing in the North and East Provinces which admit Tamil speaking nursing and midwifery students fail to admit students periodically whereas schools in the other regions continue without disruption. Save the Children Fund (UK), and UNICEF have attempted to fill the gap and meet the needs by training and employing rural health assistants and health visitors who

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<sup>3</sup> Velauthapillai, K., "Septicaemia deaths in Jaffna" (unpublished) (North Colombo Medical College)

are able to provide some form of primary health care, and serve as substitutes for public health midwives and public health inspectors. The assistance and support given by these organisations avoided the total breakdown of community health services in the region.<sup>4</sup>

Prior to 1983 several Tamils who graduated from the medical schools in Sri Lanka have served in the North East. However, subsequent to commencement of the violent conflict these graduates chose to serve outside the North East or leave the country. Medicins Sans Frontieres (MSF) (Doctors Without Borders) have provided some specialised assistance in Point Pedro, Trincomalee and Batticaloa, and a team of Cuban doctors have assisted in Amparai. It is commendable that these organisations and individuals have stepped in to provide medical services which would otherwise be unavailable to patients in the region.

The ban on equipment, chemicals and drugs, the destruction of medical facilities by the war, and insufficient allocation of funds for medical care in these areas have further impaired the quality of care patients receive. Doctors in these areas cannot handle several serious diseases due to the lack of facilities and inaccessibility to necessary drugs. Such patients need to be transported to Colombo. For the last couple of years the ICRC has run a service to bring such patients to Colombo. Even though the journey from the Jaffna General Hospital to Colombo takes approximately 30 hours and is not comfortable, these patients are able to reach

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<sup>4</sup> Nachinarkinian, C.S., "Current Pattern of Health Care and Resource Allocation" and "Ethnic Conflict in Sri Lanka - The Effect on Health," papers presented at the International Conference on Health titled *Victims of War in Sri Lanka: A Quest for Health Consensus* (London, September 1994)

Colombo for treatment without encountering the dangers of crossing the Jaffna lagoon in small boats. Unfortunately, the number of patients that the ICRC is able to bring is severely limited, and many who need treatment in Colombo are forced to stay in Jaffna since they cannot make the journey via the lagoon. The ICRC is forced to prioritise according to the type of illness, degree of severity, and availability of even some treatment in Jaffna.

The five private hospitals in Jaffna, with a total bed strength of 123, are unable to function properly due to the high cost of drugs and medical supplies. Many patients are unable to take advantage of the services provided by these hospitals due to the high cost. The number of patients treated by these hospitals dropped by 70% over the last two to three years. Access to drugs even in the black market was difficult. In a survey conducted by Dr. C.S. Nachinarkinian, Lecturer in Community Medicine, University of Jaffna, on 25 August 1994 the following drugs were not available even in the larger drug stores in Jaffna town: Inj. Crystalline Penicillin, Prochlorperazine tablets, Vitamin B complex tablets, Cotrimoxazole tablets, Aludrox tablets, Aminophylline tablets and Prednisolone tablets.<sup>5</sup>

The Hill Country Tamils too continue to suffer as a result of inadequate access to health care. An acute shortage of medical officers prevails in these regions. Most often people have access to only Registered Assistant Medical Practitioners. The plantation community's infant and maternal mortality rates have continued to be well above the national average due to inadequate access to trained midwives, delivery

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5 *Ibid*

of babies in unhygienic conditions and the under-nourishment of mothers. The health problems of the plantation community also relate to the use of pesticides and other hazards of the plantation industry.

## **5. Employment**

Tamils continued to suffer discrimination in employment sometimes by way of the language issue and at other times purely along ethnic lines, despite the constitutional protection against discrimination in Article 12(2). This constitutional provision is followed by two caveats: a) that it is lawful to require the acquisition of knowledge of a particular language within a reasonable period of time if the function of the office cannot be carried out without a reasonable knowledge of such language, and b) that it is lawful to require sufficient knowledge of a language at the time of employment if the duties cannot be carried out without knowledge of such language. The terminology gives wide discretion for abuse and serves as a tool of legitimised discrimination. Sri Lankan Tamil, Hill Country Tamil and Muslim recruitment to the public sector has declined at an alarming rate over the years. The current representation of these groups in the public service is far below their national ethnic proportions. The statistics for 1990, as reflected in the census of government and public sector employees issued by the Department of Census and Statistics in 1992, are given in Table 1 below.

De facto discrimination in employment not only violates constitutional provisions prohibiting discrimination on such grounds as ethnicity and language, but also denies equal protection of the law in violation of Article 12(1), which



stipulates that "All persons are equal before the law and are entitled to the equal protection of the law."

**TABLE 1 Minority Representation in the Public Sector**

| Minority Groups     | % of<br>Population | % in State<br>Services | % in<br>Provincial<br>Services | % in Semi-<br>government<br>Services |
|---------------------|--------------------|------------------------|--------------------------------|--------------------------------------|
| Sri Lankan Tamils   | 12.7               | 5.9                    | 7.1                            | 8.2                                  |
| Hill Country Tamils | 5.5                | 0.1                    | 0.2                            | 0.5                                  |
| Muslims             | 7.4                | 2.0                    | 4.6                            | 1.0                                  |

The mandate of the Commission on the Elimination of Discrimination and Monitoring of Fundamental Rights (hereinafter Commission on Discrimination) envisions not only the conducting of inquiries into complaints of discrimination, but also the active monitoring of the observance of fundamental rights to ensure that all citizens enjoy the equal protection of the law. The Commission on Discrimination was given a broad mandate, not only to hear and resolve complaints of discrimination but also to monitor discriminatory practices and take measures to eliminate such practices. However, the Commission has failed to take a proactive role in investigating and eliminating systemic discrimination as envisioned by the mandate granted to it. Measures should be undertaken to enhance the Commission on Discrimination's effectiveness in monitoring discriminatory laws and practices by sector, organisations and institutions to identify systemic discrimination and violation of equal protection of the law and develop appropriate measures to eliminate and proscribe such practices.

The Office of the Ombudsman should also be utilised to ensure the equal protection of the law and prevent discriminatory practices.

## **6. The Negotiations between the Government and the LTTE**

Upon the PA government's assumption to power the economic embargo was partially lifted giving an indication that it was serious about resolving the ethnic conflict by non-military means. The president created a new Ministry of Ethnic Affairs and National Integration, which she heads herself. In response to the PA government's, and particularly to the then Prime Minister Kumaratunga's initiative, LTTE leader V. Pirabhakaran in a rare public statement reiterated his willingness to engage in unconditional dialogue. The first government delegation, headed by Mr. Balapatabendi, secretary to the president, met with the LTTE delegation in Jaffna. The government's peace delegation received a rousing and emotional welcome in Jaffna. There was a general sense of euphoria in the land.

The government had also revoked the ban on civilian crossing of the Jaffna lagoon at Kilaly and people were able to travel without fear of shelling and bombing, even though the journey remained time-consuming and strenuous. The embargo on food and other non-military items which was lifted by gazette notification, suffered in implementation. The military was accused of inhibiting the free flow of these items at the check points. Although the life of the northern population eased somewhat as a result of the new government's initiatives, there were complaints of inadequate implementation.

The bomb blast at the UNP political rally which killed the UNP presidential candidate and several other party leaders sent shock waves through the country and temporarily halted the peace negotiations. The new President Kumaratunga reiterated her commitment to the peaceful resolution of the ethnic conflict and resumed negotiations. The initial euphoria had nevertheless waned, replaced by cautious optimism.

## **7. Conclusion**

For the most of 1994, no progress was made in the legislative or institutional mechanisms relating to minority rights. The rights minorities enjoyed in Sri Lanka failed to measure up to the international minimum standards articulated in the various United Nations instruments as well as the rights and protection guaranteed by the Constitution of Sri Lanka. Even outside the areas affected by the on-going civil war, minorities were unable to fully realise their social, economic and political rights as guaranteed by international and domestic standards. After it came to power, the new government's stated policy towards minorities signalled a shift favourable to the realisation of minority rights. By the end of 1994, since the government had been in power only for a very short time, it was difficult to assess whether the stated policy would be implemented. Nevertheless, the few actions instituted, such as the appointment of new members to the Official Languages Commission, relaxing of the embargo in the North East, and initiating negotiations with the LTTE, have been steps in the right direction. It is hoped that the government will take serious note of the issues highlighted in this chapter and institute appropriate and effective legal and institutional mechanisms, including enforcement bodies,

to ensure the full enjoyment of all rights of persons belonging to minority groups in Sri Lanka.

It is recommended that the government undertake the following measures to ensure the protection and promotion of the rights of minorities in Sri Lanka so that they can live with dignity as equal citizens of Sri Lanka:

- (1) Formulate a framework of power sharing with sufficient financial resources and conflict resolution mechanisms, within a federal constitutional structure where the minorities and all segments of society would have legislative and executive autonomy over areas crucial to their economic, social, cultural and political development, such as education, land, social, cultural and economic development, and with strong protections in place for minorities resident in all areas of the island.
- (2) In the area of language, the new Commission's strategy should be speedily implemented and this should be backed by the government in resources and political will.
- (3) Take measures to make institutional mechanisms such as the Commission on Discrimination and the Office of Ombudsman effective in eliminating discrimination and ensuring that persons belonging to minority groups enjoy the equal protection of the law.
- (4) Undertake measures to redress the inequalities in educational resources available to Tamil speaking students in terms of qualified and trained teachers, and access

to such facilities as training of teachers, teachers' guides, text books, schools and educational materials.

- (5) Improve the health facilities, access to medical practitioners including specialised doctors and nurses, and medicines in the plantation areas as well as in the North East.

## **XIII**

# **The Internally Displaced**

### **1. Introduction**

Sri Lanka has experienced intense and sustained armed conflict for almost two decades. The conflict, arising out of a failure to manage inter-ethnic tensions effectively, has brought heavy costs in lives and property as well as having far-reaching psychological consequences.

An enormous number of people have been displaced by the conflict. At the end of 1994, the government estimated that approximately 525,000 people were displaced within the country, and another 140,000 displaced abroad. Some of the latter have sought asylum status.

Displacement has affected people's physical security, quality of life and potential for physical and emotional growth. The threats to their personal liberty and the obstacles to their enjoyment of economic and social rights, and to the development of their full personal potential, are greater than for other Sri Lankans. They and their children face an uncertain future. The conditions under which most displaced persons live and work are an affront to human dignity. Displaced women and children are particularly vulnerable.



Although remaining within the domestic jurisdiction of the state concerned, the internally displaced share many of the characteristics of refugees but often their needs and vulnerability are greater. This is especially the case when displacement results from ethnic or other conflict; the displaced often become pawns in military games played by the warring parties. Their vulnerability is compounded by the lack of international standards and institutions specifically mandated to deal with this problem.

## **2. Displacement Policy**

There has been a clear shift, both at the level of government policy and at the grassroots level, in the way that displacement is being approached. Previously the state and NGOs focused almost exclusively on providing relief and assistance. This approach was shaped by the belief that displacement was a temporary phenomenon which needed to be addressed through short term additional provision. Thus, the state's scheme of assistance was called the "Emergency Reconstruction and Rehabilitation Programme" (ERRP). This programme, which was managed by the state and funded by the state and foreign donors, officially ended in December 1994.

However, as displacement acquired a semi-permanent flavour, approaches changed. The emphasis shifted to helping the displaced "take responsibility for their lives" and to trying to foster a sense of independence in the displaced population. Less attention is now given to "handouts;" increased attention is given to activities intended to establish self-reliance among the displaced population, especially relating to employment and the generation of income.

In early 1995 the PA government published its policy on displacement.<sup>1</sup> It said:

*relief, rehabilitation and reconstruction aims at bringing the population affected by ethnic violence and terrorist activities back to productive life by providing basic amenities to live with dignity, paying compensation for the loss and damage sustained and to create a physically, economically, and socially sustainable environment for their progress. In this context relief, rehabilitation and reconstruction will be treated as an exercise integrated with [the] development process.*

The new policy emphasised that:

- \* the basic human dignity of displaced persons will be recognised;
- \* no forcible resettlement will take place;
- \* the conditions of welfare centres (camps) will be improved;
- \* a realistic package of assistance for resettlement/relocation will be provided; and
- \* loans to start economic enterprises will be granted through a Reconstruction and Rehabilitation Bank, which is yet to be set up.

The progressive closure of welfare centres is also part of the new policy. The Minister was reported to have said that all camps would be closed in a year.

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<sup>1</sup> Ministry of Shipping, Ports, Rehabilitation and Reconstruction, "Performance, Policy, Strategies and Programmes 1994 - 1995." (Hereinafter, Ministry Document)

The resettlement and rehabilitation programmes pay hardly any attention to addressing the psychological consequences of displacement; nor do they seek to find ways to build links between the various communities affected.

## **2.1 Resettlement**

Resettlement is one aspect of the government's programme of assistance to displaced persons. Resettlement of the displaced in their original places of residence is viewed as the ideal response to displacement. Yet resettlement is a complex and often prolonged process. There is no clear end to the conflict which generated the displacement, and the infrastructure and social ties in the area may have been destroyed.

In 1993 the Ministry of Rehabilitation, Reconstruction and Social Welfare issued a set of very laudable resettlement guidelines.<sup>2</sup> The resettlement programme aims, through the provision of direct monetary grants and other indirect assistance, to assist internally displaced persons re-establish their lives in their home areas.

The resettlement programme of the state has in practice blatantly disregarded the resettlement guidelines. Under the guidelines, the voluntary nature of the return is a key principle. Yet, this principle has been observed more in the breach. The 1993 resettlement programme violated these guidelines.<sup>3</sup> However, the 1994 picture is slightly more complex. While the intensity of the state-sponsored resettlement programme

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<sup>2</sup> See *Sri Lanka: State of Human Rights 1993* (Law & Society Trust, Colombo, 1994)

<sup>3</sup> *Ibid*

decreased, it also seemed that a larger number of the displaced wished to resettle. This was despite conditions being less than normal in the areas from where they originated, such as Mannar district. Some displaced people at the Clappenberg camp in Trincomalee complained that the state was not facilitating their return home.

The military had played a major role in shaping policy under the previous UNP administration, especially regarding resettlement of the displaced. Resettlement could not take place without "clearance" given by the military and was often induced by orders from the military. The control exercised by the armed forces is said to have decreased in 1994, especially following the change of government. However, it was not clear whether decreased military influence would continue.

The areas sometimes designated as "cleared" by the state and therefore fit for resettlement are often not fit for economic activity. While settlers may be able to construct a house, there may be obstacles to their resuming economic activity. For example, fishing may not be permitted or be restricted, or farming may not be possible for security reasons or due to the lack of irrigation and other facilities. Approximately 16,000 families were resettled in 1994.<sup>4</sup> The breakdown is as follows:

|             |       |
|-------------|-------|
| Ampara      | 3,264 |
| Trincomalee | 5,285 |
| Batticaloa  | 4,117 |
| Vavuniya    | 3,630 |
| Mannar      | 339   |

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<sup>4</sup> Ministry Document, *supra* n 2, p 41

The government has also resettled 167 families in the village of Kappalthurai in the Trincomalee district. The state views this as a model resettlement village which it hopes to replicate in other areas. Over the years, some families have been displaced and resettled several times. A total of 98,253 families have been resettled since June 1990.<sup>5</sup>

Those who resettle are paid a Settling in Allowance (SIA) of Rs. 2,000, a Productive Enterprises Grant (PEG) of Rs. 4,000 for the resumption of economic activities (paid only if the family monthly income is under Rs. 2,500), and a housing grant. However, there have been frequent complaints that the resettlement allowances are not paid, especially the housing grants. Even government officials concede this. The involvement of several state agencies, together with acute cash flow problems in the treasury, have sometimes resulted in grants and allowances being held up.

Previously those who resettled and were paid the resettlement allowances ceased to receive government food rations after three or six months. According to the new policy, food rations will cease six months after the resettled family receives the PEG. A local government official determines when the family is ready to receive the PEG. Following the change of government, some people seemed reluctant to resettle because they hoped that they might receive a better deal from the new government at a later date.

The displacement policy of the new government envisages an expedited programme of resettlement with the objective of closing down the welfare centres.<sup>6</sup> The resettlement

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<sup>5</sup> *Ibid*

<sup>6</sup> *Ibid*, p 32

process is expected to take place in two phases. Phase I will involve the construction of a temporary hut. Those resettling will be paid the SIA of Rs. 2,000 and given Rs. 1,000 worth of "implements." The PEG will be given on the recommendation of the Divisional Secretary when he or she is satisfied that the family is able to recommence economic activities. The PEG will also be supplemented by soft loans of up to Rs. 6 million per affected family.

Phase II envisages the construction of a permanent shelter. A grant of Rs. 25,000 and a loan of Rs. 25,000 will be made available to the affected family. Phase II will also result in loans being made available for economic activity through the Reconstruction and Rehabilitation Bank, once it is set up.

There have been criticisms of the lack of involvement of the displaced themselves in the processes of resettlement. As one report said,

*In almost all cases, people have in fact been excluded from the planning exercise and the decision making process. The democratising content of the exercise has not been taken seriously by the officials. For them "people's participation" meant no more than reducing the cost of implementation by obtaining the free labour of local people.<sup>7</sup>*

By no means do all displaced people wish to resettle at present. They give several reasons, including that:

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<sup>7</sup> Rajasingham, M., "Emergency Reconstruction and Rehabilitation Programme," Position Paper of the NGO - Donor Consortium (October 1994)



- \* their title to land is not clear
- \* they are hoping for a better deal from the state
- \* their home areas are not "cleared" and not secure
- \* their children's schooling may get disrupted

There may also be a lack of infrastructure such as wells, schools, roads and electricity in the home areas, and of income generation opportunities.

The LTTE has its own resettlement programme in which military considerations play a significant role.

## **2.2 Relocation**

Under the PA government's policy, when it is not possible to resettle persons in their original places of residence, they will temporarily be relocated on state land.

## **2.3 Corruption**

Frequent allegations have been made about corruption. There are allegations that food rations meant for the internally displaced are siphoned off in Colombo, prior to reaching their destinations. There are other allegations relating to the contracts to transport food rations. However, there is little hard evidence of corruption, and the allegations are hard to prove. It is often said that relief operations do not follow strict guidelines in procuring goods and services, making the room for corruption and pilfering that much greater.

### 3. The Internally Displaced

There is yet no widely accepted definition of the "internally displaced." The Analytical Report of the Secretary General on Internally Displaced Persons defined them as:

*persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country.*<sup>8</sup>

This definition was adopted by Francis Deng in his Sri Lanka Report,<sup>9</sup> in which he observed that in the Sri Lankan context it is very hard to reach a satisfactory and accurate definition. He observed, however, that a large proportion of the internally displaced can be identified by the fact that they are housed in special camps and have special needs for assistance and protection. The conflict has generated five categories of displaced persons within Sri Lanka:

- \* Those displaced and living in camps;
- \* Those displaced and living outside camps;
- \* Refugees who have returned from Tamil Nadu and are living in transit camps;
- \* Those who have been resettled; and
- \* Asylum-seekers being repatriated by Western states.

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<sup>8</sup> Deng, F., "Analytical Report of the Secretary General on Internally Displaced Persons," E/CN.4/1992/23., para 17

<sup>9</sup> Deng, F., "Profiles in Displacement: Sri Lanka," submitted pursuant to the Commission on Human Rights Resolution 1993/94, E/CN.4/1994/44/add.1, 25/1/1994, para 132

According to government statistics, 524,202 persons were displaced within Sri Lanka at the end of July 1994.<sup>10</sup> These figures included only those who received food rations, however, so the true figure may be higher. On the other hand, there is also suspicion that the number of displaced registered to receive rations in the North may have been inflated by the LTTE.<sup>11</sup> There is no official ethnic breakdown of the internally displaced. However, it is estimated that about 78% are Tamils, 13% are Muslims and 8% are Sinhalese.

#### **4. International Standards**

Apart from some provisions of international humanitarian law, there are currently no international standards directly applicable to displacement. One of the major tasks before the global community is to try and develop standards and mechanisms that will protect internally displaced persons. An attempt towards this end has been made by Francis Deng, Special Representative to the UN Secretary General on Internally Displaced Persons. At the 51st Session of the Commission of Human Rights the Special Representative presented a "Compilation and Analysis of Legal Norms" with regard to internally displaced persons.<sup>12</sup> One of the conclusions of this study, however, was that lack of political

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<sup>10</sup> Ministry Document, *supra* n 2

<sup>11</sup> This comment was made by a member of an international NGO in an interview in 1994.

<sup>12</sup> E/CN.4/1995/CRP.1, 30 January 1995. The compilation was based on studies conducted by three institutions: the Ludwig Boltzmann Institute for Human Rights, the American Society of International Law and the International Human Rights Law Group. The study was reviewed by a meeting of international legal experts in Vienna in October 1994.

will to implement existing rules and norms was the major problem, rather than insufficient legal protection.<sup>13</sup>

#### 4.1 Human Rights Law

Although not directly addressing issues of displacement, principles of international human rights law contained in the International Bill of Human Rights (comprising the UDHR, ICCPR and the ICESCR) are applicable to displaced persons, as they are to other Sri Lankans. Provisions of the International Bill apply to all people, unlike principles of humanitarian law which apply only in situations of armed conflict; or those of refugee law which apply only if a person has crossed an international border and sought asylum.

International human rights law guarantees a wide spectrum of rights, straddling both civil and political, and social, economic and cultural rights. Some rights are of immediate relevance:

Right to the freedom of movement and the freedom to choose one's residence (Article 13, UDHR; Article 12, ICCPR). This includes the rights to leave one's place of origin; to change a temporary living area; to return home; to cross international borders and seek asylum abroad;<sup>14</sup> the right not to be forcibly resettled and not to be forcibly expelled from one's own country. Such rights can be restricted only on grounds of national security, public order, public health or morals or to protect the rights and freedoms of others. However, as the Special

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<sup>13</sup> "Compilation and Analysis of Legal Norms," para 75

<sup>14</sup> *Ibid*, para 29

Representative notes, the limitations have to reflect a reasonable balance between public needs and the seriousness of the situation of the individual.

The non-derogable right to life (Article 3, UDHR; Article 6, ICCPR) and the corresponding right to live with human dignity.

The right to an adequate standard of living, including adequate food, clothing and housing and to the continuous improvement of living conditions (Article 11, ICESCR).

The non-derogable right to recognition everywhere as a person before the law (Article 6, UDHR; Article 16, ICCPR). Thus the loss of identification documents during flight should not result in the submergence of a displaced person's legal personality and a denial of access to government services or the courts.

The right against discrimination (Articles 2 and 7, UDHR; Articles 2 and 3, ICESCR; Articles 2, 3 and 26, ICCPR).

#### **4.2 Affirmative Action and Displacement**

Also pertinent is the Vienna Declaration, which notes that great importance must be given to the promotion and protection of human rights of "groups which have been rendered vulnerable."<sup>15</sup> It goes on to observe that:

*States have an obligation to create and maintain adequate measures at the national level, in particular in the fields*

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<sup>15</sup> Vienna Declaration and Programme of Action, United Nations (1993) para 24

*of education, health and social support, for the promotion and protection of the rights of persons in vulnerable sectors of their populations and to ensure the participation of those among them who are interested in finding a solution to their own problems.*

Given that internally displaced persons constitute a vulnerable group, it is thus possible to argue that they deserve enhanced protection compared to other sectors of the population.

Where persons have been continuously displaced and rendered more vulnerable for a period of time, their entitlement to special privileges in the nature of affirmative action programmes should be considered. Programmes of affirmative action, which are viewed as temporary programmes designed to assist historically discriminated against groups, have been justified in some cases. They try to guarantee that members of the discriminated group have access to education, work and other resources. In the case of the displaced, if their displacement has resulted in a denial of equal access to opportunities and resources, then clearly a short term programme of affirmative action would be justified.

### **4.3 Other International Instruments**

There are other international instruments which contain principles applicable to the protection of the internally displaced. Among these are the UN General Assembly Resolution (45/153) on Human Rights and Mass Exoduses (1991) and the UN Sub Commission Resolution on Forced Evictions (1991).



It is possible to deduce from these international instruments more specific standards, including a right not to be displaced, or as the United Nations High Commissioner for Refugees (UNHCR) has chosen to express it, the right to remain. Other standards that recognise the right of people to flee scenes of conflict and their right not to be relocated or resettled against their wishes and amidst conditions of conflict also flow by implication from the broader statement of principles contained in these international instruments.

Other human rights instruments are also generally applicable to the displaced, including CERD, the Torture Convention, CEDAW and Convention on the Rights of the Child (CRC).

#### **4.4 Humanitarian Law**

Principles of international humanitarian law also impinge on displacement and are relevant to the treatment and care of the internally displaced. Common Article 3 of the Geneva Conventions and Additional Protocol II are directly applicable in cases of conflict of a non-international nature. They attempt to lay down basic standards of humanitarian protection which both parties to the conflict are bound to observe in relation to non-combatants. Sri Lanka has not ratified Additional Protocol II; should it do so, the provisions would be binding on both parties to the conflict.

Article 17 of Additional Protocol II prohibits the displacement of civilian populations unless their security is involved or military reasons so demand. If civilian populations are displaced under these exceptions, measures should be taken to see that they are "received under satisfactory conditions

of shelter, hygiene, safety and nutrition." Francis Deng argues that Article 17 does not appear to cover situations where people flee because of a generalised threat of violence and fear, as distinct from being ordered or compelled to move.<sup>16</sup> However, Article 17(2) states that "civilians shall not be compelled to leave their own territory for reasons connected with the conflict." It is possible to interpret this provision expansively so as to include situations where civilians are forced to flee because of a threat of violence.<sup>17</sup>

Common Article 3 and Additional Protocol II expressly prohibit 23 different acts ranging from murder and torture to indecent assault. Additional Protocol II further provides that where essential supplies are lacking the state concerned must agree to the mounting of relief operations which are humanitarian, impartial and conducted without distinction.

The educational rights of children are guaranteed under Article 4(3) of Additional Protocol II. Steps should also be taken to facilitate the reunion of children with their parents. The recruitment of children under 15 for use in the conflict is forbidden.

## **5. Domestic Norms and the Rights of the Displaced in Sri Lanka**

Most of the displaced are citizens of Sri Lanka and come within its domestic jurisdiction. They are thus entitled to

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<sup>16</sup> See Deng, F., *Protecting the Dispossessed: A Challenge for the International Community* (Brookings Institution, Washington D.C., 1993) p 7

<sup>17</sup> Article 17 of Additional Protocol II is one of the few international provisions which directly addresses the forced dislocation of people.

the fundamental rights guaranteed under Chapter III of the Constitution and to other basic services available to other citizens. As Francis Deng noted, the responsibility of ensuring the minimum standards of human existence and dignity - physical protection, shelter, food, clothing, basic health and the integrity of the person and the family as the most fundamental social unit - rests with national governments.<sup>18</sup>

Under Article 14(1)(h) of the Constitution, all citizens are entitled to the freedom of movement and the right to choose their residence. The right is subject to restriction on the grounds of national economy, apart from the other general restrictions laid down in Article 15(7). These are: national security, public order and the protection of public health or morality, securing recognition and respect for the rights and freedoms of others, and meeting the just requirements of the general welfare of a democratic society.

Under the present conditions of conflict the displaced certainly cannot exercise their right to freedom of movement. Moreover, the state's efforts at forcibly resettling the displaced is a violation of this right.

## **5.1 Family Rights**

International human rights law recognises the family as the basic unit of society and in need of protection and support.<sup>19</sup>

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<sup>18</sup> Deng, F., "Comprehensive Study on Internally Displaced Persons," Report of the Representative of the Secretary General submitted pursuant to Commission on Human Rights Resolution 1992/73, E/CN.4/1993/35.

<sup>19</sup> Article 16(3) of UDHR, Article 10(1) of the ICESCR and Article 23 of the ICCPR

Human rights law also protects the right to privacy.<sup>20</sup> Displacement has affected these rights in particularly significant ways.

In several cases the men of the family have either been killed or have disappeared. Women have had to assume greater responsibility in the management of their families, including discharging economic burdens.

The conflict has also affected the privacy of family life in situations where the family has remained intact and survived the conflict. The quality of life in camps is of a poorer standard than enjoyed previously. Camp life has resulted in outrageous invasions of privacy, especially of women. Their areas of habitation are sometimes cordoned off only by old sarees and other pieces of rag.

## **5.2 Resettlement Norms**

Resettlement to one's original place of residence can be spontaneous or organised by third parties. Resettlement promoted by third parties should take place only in conditions which favour return. Thus the factors which originally motivated persons to flee should have been removed. The displaced persons should be able to return to a secure environment in which he or she could restart life in an untroubled and undisturbed manner.

It is possible to develop from the freedom of movement contained in Article 12 of the ICCPR a principle analogous

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<sup>20</sup> Article 12 of the UDHR and Article 17 of the ICCPR

to that of *non refoulement*. According to the principle of *non refoulement* - which is the core of refugee law - a person cannot be forced to return to a country where their lives or fundamental freedoms are in danger. The freedom of movement which applies to all persons in a territory would correspondingly guarantee a person the freedom not to be forced to return to a *situation* where his or her life or fundamental freedoms are in danger. According to international human rights law this right can only be restricted on the grounds of national security, public order, public health or morals or to protect the rights and freedoms of others.

A number of the displaced living in camps do appear to wish to return home, despite conditions being less than ideal in their home areas, where basic infrastructure may be lacking and the area still riven by conflict. There seems to be large scale disillusionment with camp life. While spontaneous return is often interpreted as a return to normalcy, it could not be interpreted as such in Sri Lanka at present.

### 5.3 Right to Remain

The right to remain is not specifically articulated as a right in international human rights law.<sup>21</sup> Yet, it is possible to deduce this right from other provisions of human rights law. The Sri Lankan experience demonstrates that the right

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<sup>21</sup> See Goodwin-Gil, G., "The Right to Leave, the Right to Return and the Question of a Right to Remain," paper prepared for the Colloquium, *The Problems of Refugees in the Light of Contemporary International Law Issues*, organised by the Graduate Institute of International Studies and the UNHCR (Geneva, 26-27 May 1994)

to remain should encompass not only the right to physically remain, but also the right to physically leave. While international human rights law recognises the right to leave and enter one's country, by analogy the right to leave and enter a territory controlled by a government or some other entity should also be recognised. The essence of this right is contained in the freedom of movement recognised in international human rights law.

#### **5.4 Relief and Assistance**

The Emergency Reconstruction and Rehabilitation Programme was launched after the signing of the Indo-Lanka Accord in July 1987. The Programme covered housing, transport, highways, railways, roads, agriculture, agrarian services, animal husbandry and other areas. According to government statistics, a total of Rs. 19.1 billion was spent from July 1987 to the end of 1994.<sup>22</sup>

The Sri Lankan State provides several forms of assistance to the displaced:

- (1) Compensation payments to those whose relations have been killed or injured;
- (2) Food rations to the displaced population living in "camps" and those staying with relations; and
- (3) Resettlement assistance, including assistance to build a house, to those who agree to go back to their areas of origin.

Under the UNP government, the Ministry of Rehabilitation, Reconstruction and Social Welfare was responsible for

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<sup>22</sup> Ministry Document, *supra* n 2, p 24



channelling assistance to the displaced. Under the PA government it is the Ministry of Ports, Shipping, Rehabilitation and Reconstruction. Lack of co-ordination among the different ministries and government entities involved has plagued the displacement problem in Sri Lanka. An Inter-Ministerial Task Force has been set up which, if it functions effectively, could help cut red tape significantly. However, it did not appear to have been very active by the end of 1994.

### **5.5 Right to Food**

Until December 1994, the state provided food rations to the displaced both in government-controlled areas and LTTE-controlled areas. Food coupons were distributed which entitled the displaced to purchase food from co-operative stores in their locality. According to government statistics Rs. 2,133 million was spent in 1994 on providing food rations to the displaced.<sup>23</sup>

However, from around November 1994, the state began a pilot project in Trincomalee district to provide money in lieu of the food coupons. This will be extended to other areas if found to be effective.

Food rations are given on the following basis:

|             |                             |
|-------------|-----------------------------|
| Family of 5 | maximum of Rs. 315 per week |
| Family of 4 | maximum of Rs. 252 per week |
| Family of 3 | maximum of Rs. 210 per week |

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<sup>23</sup> *Ibid*, p 38

|             |                             |
|-------------|-----------------------------|
| Family of 2 | maximum of Rs. 154 per week |
| Family of 1 | maximum of Rs. 84 per week  |

## **5.6 Right to Education**

The major problem with regard to education in the newly resettled areas is finding teachers to serve there. No financial incentive is offered to teachers to move to these areas, although this is under consideration by government officials. Some NGOs like Oxfam support teachers in some schools. Access to education is more difficult for the children of those who have resettled than for those in camps, who do appear to have access to basic schooling. In Puttalam several of the displaced have had to attend evening classes or cram into existing schools with the resident population.

Children from refugee camps, despite the poor environment, do sit and pass public examinations. For example, nine children from the Clappenberg camp had passed the GCE O/L Examination held at the end of the junior secondary school. However, there are significant numbers who fail.

## **5.7 Right to Housing**

All displaced families resettled were given a grant of Rs. 5,000 to construct a temporary shelter, to be built to ministry specifications, with a concrete floor. After the PA government took office in August this was increased to Rs. 7,000. The National Housing Development Authority (NHDA) through which housing grants were channelled had proved to be extremely slow in disbursing funds. There were many allegations of inefficiency and corruption levelled against the NHDA.

Under Phase II of the new resettlement policy a grant of Rs. 25,000 will be made available to each family whose house has been destroyed.<sup>24</sup> In addition a loan of Rs. 25,000 will be made available at a concessionary rate of interest. Where houses have been damaged, a sum of Rs. 25,000 will be provided to assist in repairing the damage.

During 1994, 10,604 families were granted housing assistance amounting to Rs. 141,662,473. The total sum spent on housing assistance since the programme began in 1988 is Rs. 568,876,230 (to 64,986 families).<sup>25</sup>

## **5.8 Right to Work**

Employment not only generates feelings of independence and self reliance, but has psychological implications as well. Regular work, like regular schooling, is indicative of a degree of normalcy and helps promote a sense of well-being for the displaced. In a patriarchal society like Sri Lanka, where the husband has been viewed as the provider and the wife the house keeper, it also impinges on traditional social roles.

Traditionally, the main occupations in the North East were agriculture, fishing, animal husbandry, carpentry, masonry and allied trades. The government-imposed restrictions on items such as cement, iron, agrochemicals and fertilizers adversely affected these occupations. Moreover, credit is also limited and available only in the cleared areas. NGO credit assistance programmes are of limited scope. The government has

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<sup>24</sup> *Ibid*, p 33

<sup>25</sup> *Ibid*

recently announced that it intends to set up a Reconstruction and Rehabilitation Bank to assist displaced persons initiate economic activities.

There have also been other restrictions on employment, including the transport of essential goods. For example, in the Batticaloa district, farmers cultivating on the mainland, across the lagoon, faced restrictions when transporting agricultural inputs and fuel for tractors. Other areas such as Erakulam, Mylavettuvan and Perilaveli were not physically accessible, for security reasons. Additionally there have been restrictions on the transport of harvested goods such as paddy. Permits need to be obtained to transport a maximum of 30 bags of paddy on a single tractor. Restrictions on fishing were also in force in 1994, in certain areas.

Most displaced persons appeared to have some form of employment. Although irregular and mostly of a "casual" type, it provided some degree of remuneration. There were also indications that women were more likely to seek work than the men. However, many displaced persons have complained of the general lack of employment opportunities and in some areas the local population did not welcome the presence of the displaced in the local labour market. In the Puttalam area there were reports that the displaced were offering their labour at cheaper rates, thus straining the relationship with the local population. Several NGOs have initiated income generating and training projects with the displaced. They aim to make them more employable in such areas as paddy cultivation, poultry keeping and carpentry.

In his Sri Lanka Report Francis Deng said that as the resources available to the state were limited, income generation

activities and the provision of employment opportunities should be placed high on the government agenda. Despite Deng's recommendation, there is little evidence of state sponsored programmes to generate employment.<sup>26</sup> Most employment projects have been started by NGOs. The only direct intervention by the state is the PEG, which is sometimes paid in instalments, and loans given for economic activities under International Development Agency (IDA) credit. In the first half of 1994, 176 persons were granted Rs. 50,849,000 as loans under this scheme.<sup>27</sup> There was also some credit given under an ADB scheme for agricultural activities. In 1994, 79,321 families were paid Rs. 315,565,000 under the PEG scheme. The total outlay under the PEG scheme from 1988 to 1993 was Rs. 145,770,727 to 330,944 families.<sup>28</sup>

The use of forced labour by the military decreased in 1994.

## **5.9 Right to Health**

Access to health care varies between camps. There are no health care facilities located within the camps although the residents do have access to health facilities in the vicinity. Mobile clinics visit some camps. Several NGOs operate health care programmes for the displaced. The standard of health care available in the "uncleared" areas is reported to be worse than in some of the "cleared" areas.

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<sup>26</sup> See also the comments made by United Nations officials to the Special Representative, that although income generation remained high on the agenda of the state, its scale was limited, Deng, F., "Human Rights, Mass Exoduses and Displaced Persons," Report of the Representative of the Secretary General submitted pursuant to Commission on Human Rights Resolution 1993/95 and 1994/68, E/CN.4/1995/50 (2 February 1995) para 53.

<sup>27</sup> Ministry Document, *supra* n 2, p 49

<sup>28</sup> *Ibid*, p 44

One NGO-operated health care scheme is run by the Eastern Human and Economic Development (EHED), a church-allied NGO operating in the Trincomalee district . The project involves the training of about 44 women "paramedics" who provide basic health care and sanitation advice in areas where there is little health care available. In December 1994, EHED was planning to extend this programme to a further 32 areas. The paramedics deal not only with the displaced population, but other segments of the public as well.

Medicins Sans Frontieres (MSF), which has operated in the East for many years, pulled out of the Trincomalee district in April 1994. The Red Cross is also involved in the provision of health care to the displaced.

### **5.10 The East**

In urban areas of the East, at least, the armed forces were said to have been more professional in their conduct, both in their military operations against the LTTE and in their relationship with the civilian population. There were fewer round-ups and cordon-and-search operations, and less disappearances. However, harassment - including extortion - from Tamil groups which are assisting the government in their operations against the LTTE continued.

### **5.11 Colombo**

Until June 1993 the city of Colombo hosted six camps housing displaced Tamils. However, beginning around April



1993 the state began to shut these camps down. This process was accelerated after the assassinations of Democratic United National Front (DUNF) leader Lalith Athulathmudali and President Premadasa - allegedly by the LTTE. By January 1994 only two of these camps remained in Colombo and by May 1994 they had all been closed. Two camps with Muslim residents, however, have continued to function in Colombo.

Most of the Tamil displaced who were resident in the camps in Colombo have been sent back to the East and some to Vavuniya. Some Muslims from Colombo camps have been resettled in Panadura.

#### **5.12 The Displaced and the Right to Political Participation**

Local and national elections took place in 1994. The electoral law was amended to permit displaced persons to vote from their current residence for candidates in their home districts in the parliamentary elections in August and the presidential elections in November. Thus, for example, those displaced from Jaffna could vote in their current places of residence for candidates in Jaffna. Concerns about the extent to which the displaced could participate in these elections are discussed in Chapter II on the right to political participation.

#### **5.13 Madhu Open Relief Centre (ORC)**

UNHCR resumed its operations at the Madhu ORC in February 1994. Operations were temporarily suspended in November

1993 when a UNHCR vehicle was damaged following several demonstrations by residents.<sup>29</sup>

The ORCs at Madhu and Mannar Island were established around September 1991 as part of an imaginative response by the UNHCR. They offer a safe haven to those fleeing the conflict and were seen as an alternative to flight to India.<sup>30</sup> The neutrality of the ORCs has been largely respected by both the state and the LTTE although there have been occasions when this neutrality has been breached. People move in and out of the ORC and its population increases in proportion to the intensity of the conflict in neighbouring areas.

According to UNHCR sources the tension in the Madhu ORC decreased considerably in 1994. These sources estimated that there are around 5,300 persons in the Madhu camp. However, there is in addition a large floating population. Several people live in the vicinity and use the ORC either to receive rations or to seek shelter at times of heightened conflict.

#### **5.14 Freedom of Movement and Goods**

In certain areas of the East, such as Mutur, movement was restricted and the carriage of certain goods prohibited. Travel to Trincomalee from Mutur was only permitted with

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<sup>29</sup> See *Sri Lanka: State of Human Rights 1993* (Law & Society Trust, Colombo, 1994) pp 270-273

<sup>30</sup> See Clarence, W.D., "Open Relief Centres: A Pragmatic Approach to Emergency Relief and Monitoring During Conflict in a Country of Origin," *International Journal of Refugee Law* 3 (1991) p 322

a pass issued by the military; frequent military checkpoints posed another obstacle.

Movement from the LTTE-controlled areas of the North to the South remained difficult throughout 1994. The LTTE continued to control passage from the North, although the number of departures increased after May 1994.<sup>31</sup> Permission from the LTTE is necessary to leave the area, and money often has to be paid. Sometimes a male relative has to be left in the North as security.

### **5.15 Impact of Displacement on Women**

*[T]he people most affected by this conflict have been women - morally, physically, financially. Some lost not only their husbands, but also their grown sons. Many women are traumatized, they don't know for sure if their husband [if he disappeared] is dead or alive; some have been in and out of camps since 1985.*<sup>32</sup>

The burden of maintaining family life has fallen most heavily on women, especially on those who have lost their husbands. Familiar family structures, which provided a modicum of stability, have collapsed.<sup>33</sup> The disappearance of husbands has affected some women's ability to remarry.<sup>34</sup>

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<sup>31</sup> Deng's 1995 Report, *supra* n 26

<sup>32</sup> Robinson, C., *Sri Lanka: Island of Refugees* (US Committee of Refugees, Washington D.C., 1991) p 12. (Hereinafter, USCR Report)

<sup>33</sup> See also Coomaraswamy, R., "Preliminary Report submitted by the Special Rapporteur on violence against women, its causes and consequences," E/CN.4/1995/42 (22 November 1994) para 295

<sup>34</sup> Deng, *supra* n 9, para 64

According to some estimates there were as many as 9,000 widows in Trincomalee district. In a report released in August 1993 the human rights organisation INFORM estimated that there were 18,000 widows in the Batticaloa district alone.

The state gives compensation to women who have lost husbands or sons who were supporting them. Women who have lost their spouse are paid Rs. 50,000 and those who have lost a son are given Rs. 25,000. However, the application process is extremely complex and a significant proportion of the women have not applied.<sup>35</sup> Letters have to be obtained from a local district official, the police and the military before a widow is able to obtain the application form for compensation. Even then, a large number of applicants do not obtain compensation. In some cases, compensation may take over a year to arrive.

In November 1994 the PA government introduced new legislation to facilitate the paying of compensation to widows. Section 2 of the Registration of Deaths (Temporary Provisions) Act enables relatives to apply for a death certificate one year after a person has gone missing. The production of a death certificate is essential to obtain compensation. Previously a person had to go missing for seven years before the next of kin could obtain a death certificate.

Women's groups have also begun to initiate projects aimed at fostering a sense of independence among displaced women. In the Trincomalee district a women's organisation which started in 1985 by providing clothing, rations and other

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<sup>35</sup> US Committee for Refugees Report collaborated by interviews with NGO representatives

forms of relief now concentrates on income-generation projects. The organisation also assists widows obtain compensation where they have lost their husbands. Some NGOs also provide financial assistance to widows. Other NGOs support self employment projects for female headed households.

## 6. Conclusion

In his report on Sri Lanka, Francis Deng observed:

*From the point of view of protection of human rights, the Representative was able to establish that, at least in Sri Lanka, the displaced are more vulnerable than the rest of the population in certain ways: they may be forcibly resettled, more readily subjected to round ups, arbitrary detentions or arrests; deprived of their dry rations or more frequently unable to get jobs. Those not displaced have been identified as being more self reliant and more resilient to the destructive impacts of the conflict.<sup>36</sup>*

The displaced continued to be a vulnerable and marginalised group throughout 1994. They continued to be subject to forcible resettlement and were not allowed to resettle when they wanted to. Their freedom of movement was restricted as well as their "carriage of goods." Access to education, health care and work was also poorer than the rest of the population. Their participation in wider decision-making processes was marginal. Apart from this, they also faced

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<sup>36</sup> Deng, *supra* n 9, para 135

a greater threat to their lives and liberty. Displaced women and children were particularly vulnerable. Many women were forced to suddenly assume additional responsibilities, and they have become more vulnerable to violence and exploitation.

Deng concluded:

*Unless a political solution to the conflict is found, there can be little hope either of ending the conflict or of solving the problem of internal displacement. ... it is time that the parties to the conflict should balance carefully their considerations for continuing the war and for jeopardizing the welfare of the people of Sri Lanka.*<sup>37</sup>

If the process towards negotiating a peace which began in 1994 is successful - and it is likely to be lengthy and complex - further issues relating to the displaced will arise, as there could be a huge influx into Sri Lanka of displaced people from India and perhaps from the West.

## 7. Recommendations

Policy and action regarding the displaced should be based on principles of equality, non-discrimination, participation, human dignity and co-operation. It should be holistic, properly co-ordinated and realistic. Specific attention should be given to obtaining the views and inputs of displaced persons themselves and to working with NGOs and displaced persons groups.

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<sup>37</sup> *Ibid*, para 146



The state should ensure that resettlement is voluntary and that the areas resettled are fit for habitation, with adequate infrastructure and income generating opportunities. The displaced should not be coerced into returning. They should be provided with adequate information and support to enable them to decide whether they wish to go back.

Particular attention should be paid to health and sanitation, education, work and economic regeneration, housing, counselling and inter-community relations. The particular needs of female headed households should be given special attention, and women should be encouraged to participate in the formulation of policy and the running of camps.

## XIV

# Refugees and Repatriation

### 1. Introduction

The ethnic conflict has displaced people externally as well as internally. The majority of the externally displaced fled to Tamil Nadu in India, while others sought refuge primarily in Western Europe and North America.

In 1991 the US Committee for Refugees (USCR) estimated that there were as many as 210,000 Sri Lankan refugees in Tamil Nadu.<sup>1</sup> From 1987 to 1990 UNHCR had assisted in repatriating approximately 43,000 refugees from India. However, the resurgence of violence in June 1990 resulted in a suspension of the programme and sent many of those who had returned back to India again.

In 1993 the repatriation of Sri Lankan refugees from Tamil Nadu was resumed after a lull of almost a year. Most of these refugees had been in Tamil Nadu since 1990. Prior to the actual repatriation, the Indian Government had taken a series of actions aimed at inducing the refugees to return.

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<sup>1</sup> Robinson, C., *Sri Lanka: Island of Refugees* (USCR, Washington D.C., 1991) p 2

Indian Government statistics given to UNHCR state that there were a total of 106,400 Sri Lankan refugees living in Tamil Nadu, 76,400 in camps and 30,000 outside camps. However, the USCR cited "other sources" to the effect that the figure residing outside camps may be as high as 98,000.<sup>2</sup>

The voluntary nature of the 1993 repatriation process was questioned by groups including Asia Watch. Asia Watch requested the Indian and Sri Lankan Governments to call off the repatriation unless it could be established that the refugees were returning voluntarily. The Organisation argued that its interviews with refugees in Madras indicated that the process was not voluntary. However, UNHCR, which played a limited role in the process, came to the conclusion that the refugees were returning of their own free will. The USCR was also of the view that the process was voluntary.<sup>3</sup>

The USCR reported that of the 4,972 returnees from the five districts of Vavuniya, Killinochchi, Mullaitivu, Jaffna and Mannar, 1,626 had moved to their homes by mid-September 1993. Another 2,971 had moved to the Asikulam and Veppamkulam transit camps in Vavuniya. USCR also observed that the conditions in at least two of the transit camps (Asikulam and Cheddikulam) were better than the conditions in India and that this may induce refugees to return not with the intention of going back to their homes, but rather with the intention of remaining in the transit camps.

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<sup>2</sup> USCR, *People Want Peace: Repatriation and Reintegration in War-Torn Sri Lanka* (Washington D.C., 1994) p 22

<sup>3</sup> See *Sri Lanka: State of Human Rights 1993* (Law & Society Trust, Colombo, 1994)

Apart from those who fled to India, thousands have also fled to Europe. In 1994 the Swiss Government began to repatriate Sri Lankans who had not been granted asylum status.

## **2. Repatriation in 1994**

The repatriation from India continued in 1994. A total of 8,147 persons (2,642 families) returned from Tamil Nadu to Sri Lanka in 1994.<sup>4</sup> In 1993, 6,927 refugees were repatriated. A further 10,122 persons were repatriated between 27 February and 21 March 1995. Five thousand four hundred and sixty eight were from Mannar Island. The total number repatriated from India since January 1992 is approximately 54,200. A further 56,086 remain in 123 camps in Tamil Nadu.<sup>5</sup>

The repatriation process was conducted in two phases in 1994: the first, between 28 January and 19 February, was to Talaimannar, where 3,575 persons returned; and the second, between 20 September and 30 September, was to Trincomalee, where a further 4,572 persons returned. The outbreak of the plague in India led to the cancellation of a scheduled fifth shipload of up to 700 persons in early October. Another ship which was due to carry about 2,500 refugees to Talaimannar could not sail because of technical problems.

The Indian Government has consistently refused to accept international assistance with the repatriation programme, which it funds itself. The Indian Government has also refused

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<sup>4</sup> UNHCR information sheet, 18 November 1994

<sup>5</sup> UNHCR source

to permit any international monitoring of the repatriation process. UNHCR is permitted to interview those who have volunteered for repatriation prior to their departure.

Those returning originally came from both government-controlled and LTTE-controlled areas. UNHCR has been facilitating their return even to LTTE-controlled areas. The returning refugees are first taken to transit camps in the North East. Those who come from "cleared" areas (government-controlled areas) are sent there, while those who originate from "uncleared" areas (LTTE-controlled territory) have to remain in the transit camps. Some returnees who volunteer to return to the uncleared areas are allowed to go back.

UNHCR statistics indicate that 52.5% of those who returned in 1994 had left the transit camps before the end of the year.<sup>6</sup> Presumably, they returned to their areas of origin. Several of those repatriated in September, who were originally from Jaffna, had returned to Jaffna.<sup>7</sup> The September 1994 repatriation brought three ship loads of 1,058, 1,152 and 1,189 refugees to Trincomalee harbour. They were taken to the Alles Garden transit camp, which is operated by the UNHCR and located just outside Trincomalee town.

### **3. Voluntariness**

Indian officials visit camps in Tamil Nadu looking for those who wish to repatriate. They also distribute a UNHCR leaflet (in Tamil and English) which details the extent of

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<sup>6</sup> UNHCR information sheet, 18 November 1994

<sup>7</sup> UNHCR source

assistance they would receive upon landing in Sri Lanka. UNHCR officials are allowed to interview those returning at transit camps in Tamil Nadu after they have volunteered and prior to departure.

It is difficult to draw any clear conclusions on whether the repatriation process is entirely voluntary. There have been pressures put on refugees to "push" them into leaving. On the other hand, a large proportion of the repatriates do seem to wish to return.

UNHCR's Senior Protection Officer in Colombo observed that during the February - March 1995 repatriation process, UNHCR interviewed all of the returnees prior to departure. Of over 10,000 scheduled to return, UNHCR withdrew 176 persons (1.7%). According to UNHCR most of those unwilling to return cited personal reasons such as repayment of debts, maturity, fixed deposits and the education of children as reasons for not wanting to return. In one instance 32 persons who were alleged to have been pressurised to leave were withdrawn from the repatriation process, transferred to other camps and the matter taken up with the Indian Government.

UNHCR in early 1995 maintained that 98% of those who returned in September 1994 indicated that they had received information from friends and relatives in Sri Lanka who asked them to return. UNHCR also maintained that "no security and protection problems have been faced by those who returned,"<sup>8</sup> and that "people are waiting to be repatriated." NGO workers interviewed in Trincomalee district also indicated that the majority of the repatriates were returning voluntarily.

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<sup>8</sup> UNHCR Communication, April 1995



#### 4. The Role of UNHCR

UNHCR has not been given access to the camps in India to interview refugees but is allowed to interview refugees at the point of departure. However, the Organisation's presence even in this limited role is better than no presence at all. While initially UNHCR's relationship with NGOs was limited, the Organisation now appears to be making an attempt to exploit whatever limited space there is in India.

Within Sri Lanka, UNHCR has been assisting returnees to re-integrate. Those returning to government-controlled areas are entitled to receive the same assistance given by the state to those who resettle. This includes the PEG (Productive Enterprises Grant for the resumption of economic activity), the Settling in Allowance, housing grant and food rations for six months from the date they received their PEG. Those returning to LTTE-controlled areas are given a presettlement housing allowance of Rs. 5,000 and are also eligible for government food rations. UNHCR also assists with small-scale "micro-projects" or quick impact projects (QUIPS). Of the monies budgeted for the period July 1994 to December 1995 a sum of US \$ 4.7 million of a total budget of US \$ 12.9 million has been set apart for micro-projects.<sup>9</sup>

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<sup>9</sup> UNHCR, *Appeal for Repatriation to Sri Lanka* (Geneva, June 1994)

## 5. Refugees from Europe and the West

Over 100,000 Sri Lankans are said to have sought refuge in Europe over the past few years.<sup>10</sup> However, it is almost impossible to verify this figure.

Switzerland and Sri Lanka signed an agreement on 12 January 1994 to provide for the repatriation of those applicants who had not obtained asylum status in Switzerland. The Agreement does not mention any figure, but Swiss officials have indicated that 600 to 800 persons may be repatriated over a two year period. According to the Agreement the most recently arrived will be the first to leave. Over 6,200 persons will be allowed to remain because they arrived in Switzerland prior to June 1990.

The Sri Lankan Government agreed that if a returnee is wanted by the law enforcement authorities charges will be pressed only through normal procedures; but it is not clear what this undertaking means. The government also agreed that no returnee will be forced to go back to areas of conflict. The returnees would be provided with valid travel documents before their departure.

UNHCR undertook to provide "passive monitoring" of the repatriation process, which it defined as follows:

*UNHCR will, together with the Government/embassy of the country that has repatriated an individual, seek*

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<sup>10</sup> Olsen, B., "Sri Lanka" in Baer *et al* (eds), *Human Rights in Developing Countries Yearbook 1994* (Kluwer, Netherlands) p 378

*clarifications and/or intervene with the competent Sri Lankan authorities, in respect of a returnee facing personal security problems.*<sup>11</sup>

The returnees were to be initially housed in Sri Lankan Red Cross camps or in a hostel run by the Red Cross.

Repatriation from Switzerland began in June 1994 and by the end of the year approximately 95 persons had been repatriated.<sup>12</sup> According to UNHCR sources none of these repatriates had faced any danger, and the process was "working very well."

Those returning were provided with an "Emergency Certificate" by the Sri Lankan embassy in Switzerland to enable them to travel. They were also given approximately Rs. 10,000 in Swiss francs to cover their initial local expenses, including transport from the airport. A hostel was set up in Nugegoda, Colombo, by the Sri Lankan Red Cross. Some of the returnees used this facility at least for a few days.

The returnees are entitled to apply for a National Identity Card on producing their Emergency Certificate and a police certificate from a local police station. The Department of Registration of Persons takes about three weeks to issue an identity card according to UNHCR sources.

Other European countries have been following these developments with interest. In May the Dutch Government

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<sup>11</sup> "Information note on UNHCR position concerning the return of rejected Sri Lankan Asylum Seekers," UNHCR Document, 3 February 1995

<sup>12</sup> UNHCR source

was reported to have started talks to send back about 15,000 Tamils who had been denied asylum in the country. News reports in early 1995 indicated that Norway had also decided to repatriate a large number of Sri Lankans.

Immigration officials from some Scandinavian countries and Canada visited Sri Lanka in March 1994 to find out whether the South was safe for the returning refugees. In early 1995 a delegate from the Norwegian Refugee Council and representatives from a Danish refugee organisation also visited Sri Lanka to examine the situation.

It is often hard to establish whether returnees from the West may face danger. Each case needs to be assessed on its own merits.

## 6. International Norms and Conclusion

The principle of *non refoulement* lies at the core of international refugee law. This principle (contained in Article 33 of the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol) prohibits the repatriation of persons to countries where their life or fundamental freedoms would be endangered. Neither the Indian nor the Sri Lankan Governments have ratified the 1951 Convention. However, the principle of *non refoulement* is widely accepted as being part of international customary law.<sup>13</sup>

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<sup>13</sup> Goodwin-Gil, G., "Non-refoulement and the New Asylum Seekers," 26 *Virginia Journal of International Law* (1986) pp 897-920

The return of a person to his or her country is permitted by international law only if the return is voluntary. The Convention defines a refugee as a person who has a well founded fear of persecution arising from nationality, race, religion, membership of a particular social group, or political opinion.

The UNHCR was set up by the United Nations to oversee the implementation of the 1951 Convention and to assist governmental and private efforts at voluntary repatriation.

For a decision to be truly voluntary it is essential that the displaced person be furnished with adequate information to make the decision to return. As the Lawyers' Committee for Human Rights argued in a briefing paper released in 1992:

*The logic is straightforward: presumably a refugee would genuinely volunteer to return only if he or she would not face persecution after returning. It is thus essential that refugees are able to exercise their free and unconstrained will. To be voluntary, the decision to return must be intelligent and informed.*<sup>14</sup>

Any pressure exerted on persons to return would be a violation of international law. Such pressure could be explicit, as in the case of threats, intimidation and so on; or it could be more subtle. Thus, for example, camp conditions could be allowed to deteriorate, rations could be cut, access to camps made difficult, work outside the camp restricted or

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<sup>14</sup> "General Principles Relating to the Promotion of Refugee Repatriation: A briefing paper," Lawyers' Committee for Human Rights (May 1992) p 6

prohibited and refugee groups and NGOs could be prohibited from having access to the camps. The arrest and detention of displaced persons would also be another attempt at subtle coercion.

In the case of the repatriates from Switzerland the situation is more complex. They are not returning voluntarily. However, they are being sent back on the basis that their claims for asylum status have been rejected and that there is no threat to their life or fundamental freedoms. In addition, a monitoring process has been established to ensure that they are not placed in any jeopardy.

Given the uncertainties of the security situation in Sri Lanka, it is difficult to make a general statement that the fundamental freedoms or lives of those returning from Europe are not in danger. Neither is it possible to adopt the converse position and make a broad statement that their lives and freedoms are necessarily in danger. Each case must be considered individually.

Monitoring of the return is crucial. The current "passive" monitoring provided by UNHCR is clearly inadequate. There needs to be an effective, active monitoring process, and a scheme to assist returnees to reintegrate, based on a "needs assessment" survey of this group and including strong NGO involvement.



## XV

# Children's Rights

### 1. Children in Special Situations - An Evaluation of Their Rights

In *Sri Lanka: State of Human Rights 1993*,<sup>1</sup> we gave an overview of the Sri Lankan law relating to the child. This year we deal with specific categories of children and assess whether the Sri Lankan law relating to these children is in conformity with the international standards laid down in the Convention on the Rights of the Child (CRC) and other international covenants applicable to children. Children in breach of the criminal law, children who are abused and sexually exploited, and children who are employed are the subject of this review. Our objective is to highlight the strengths and deficiencies of the Sri Lankan law in relation to these groups of children.

One important category of children which we have been unable to cover in this chapter is children affected by war. There is an urgent need for research on this crucial topic as little appears to have been done to date. There is

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<sup>1</sup> (Law & Society Trust, Colombo, 1994)

insufficient data available for us to provide an overview of the situation of these children and of the main issues which need to be addressed on their behalf.

## **2. Children in Breach of the Criminal Law**

Articles 37 and 40 of the CRC in particular, deal with the rights of children in breach of the criminal law. Other general provisions in the CRC which are also applicable must not be lost sight of. Such are the provisions which provide that in all actions concerning children, the best interests of the child shall be a primary consideration<sup>2</sup> and that the child be protected against all forms of discrimination or punishment on the basis of the status, activities, opinions or beliefs of the child's parents, guardians or family members.<sup>3</sup>

Article 37 of the CRC stipulates that a child shall not be subjected to torture, cruel, inhuman or degrading treatment or punishment. More specifically, it stipulates that neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by those below the age of 18. Other rights of vital importance to children in breach of the criminal law expressly provided for in Article 37 are those that stipulate that a child shall not be deprived of his or her liberty unlawfully or arbitrarily and that arrest, detention or imprisonment shall be in conformity with the law and used only as a measure of last resort and for the shortest appropriate time. Children deprived of liberty are to be treated with humanity and, significantly,

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<sup>2</sup> Article 3.1

<sup>3</sup> Article 3.2

in a manner which takes into account the needs of a person their age. Such children are to be separated from adults save exceptionally, where it is not considered to be in their best interests. The right of a child to maintain contact with his or her family through correspondence and visits is provided for and can only be restricted exceptionally. Children deprived of liberty in terms of Article 37 have a right to prompt legal assistance as well as a right to challenge the legality of the deprivation of their liberty.

Article 40 deals in part with safeguards intended to ensure equality before the law and a fair trial for a child who is alleged to have committed a crime under the penal system. Thus, it affirms the applicability to children of the rights already established in Articles 9 to 18 of the ICCPR. Important rights incorporated in the Convention which are now affirmatively established as applicable to children are the presumption of innocence until proven guilty, the right not to be compelled to testify against themselves, the right to examine witnesses or to have witnesses examined, the right to the assistance of an interpreter and the right to judicial review of conviction and sentence. These rights are associated with the norms of due process and not necessarily with the welfare model of juvenile justice. Some rights incorporated in Article 40 are, however, more consistent with the welfare model of juvenile justice. These are the child's right to be informed promptly of any charges against him or her and, if appropriate, through his or her parents and the right to have his or her privacy fully respected at all stages of the proceedings. Article 40 also emphasises the importance of dealing with children in breach of the criminal law without resorting to judicial proceedings. It emphasises that a variety of dispositions should be available to deal with such children,

and in particular that there should be alternatives to institutional care.

How does Sri Lankan law measure up to these norms? Some areas of concern will now be considered.

## **2.1 Criminal Capacity of Children**

Under Sri Lankan law, the minimum age of criminal responsibility currently stands at the age of 8.<sup>4</sup> Whilst the Convention itself does not stipulate what the minimum age of criminal responsibility ought to be, the Beijing Rules<sup>5</sup> state that the age should not be fixed too low, taking into consideration the emotional, mental and intellectual maturity of the child. Given that criterion, the Sri Lankan minimum age of criminal responsibility is too low.

## **2.2 Pre-trial and Trial Procedures**

Some provisions of Sri Lankan law which deal with pre-trial and trial procedures are clearly in keeping with the Convention and other international instruments. Thus, children or young persons who are arrested must be separated from adults in police stations and in court.<sup>6</sup> A child or young person who is arrested is required to be taken to the nearest police station and the Officer in Charge must then determine

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<sup>4</sup> Penal Code, Section 75

<sup>5</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice

<sup>6</sup> Children and Young Persons Ordinance (CYPO) No. 48 of 1939, Section 13

whether such a person is to be released upon a recognizance entered into by him or his parent or guardian with or without sureties.<sup>7</sup> Where the charge in respect of such a child relates to a 'scheduled offence'<sup>8</sup> and it is necessary to remove the child from undesirable associations, or if the officer has reason to believe that releasing the child would defeat the ends of justice, the child may be detained in a remand home or in the residence of any person nominated by the Minister.<sup>9</sup>

Other provisions, however, fall short of international standards relating to the rights of children. The law on remanding or committing for trial a child or young person empowers the court to commit the child to prison.<sup>10</sup> This provision has come in for intense criticism.<sup>11</sup> It is not in keeping with the Beijing Rules, which deal in depth with detention pending trial. Detention, according to these rules, should be used only as a measure of last resort and for the shortest period of time. Wherever possible, detention should be replaced by alternative measures.<sup>12</sup> Where detention is warranted, however, children must be kept separate from adults.<sup>13</sup> In the light of these provisions Sri Lankan law clearly needs revision. The option available to a court

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<sup>7</sup> *Ibid.*, Section 14(1)

<sup>8</sup> See Schedule 2, CYPO

<sup>9</sup> Proviso to Section 14(1) and 14(2). Currently the subject is assigned to the Minister of Health, Social Services and Highways. See Government Gazette 832/15, 19 August 1994. See also Article 44(1)A of the Constitution which empowers the president to assign subjects and functions to such ministers.

<sup>10</sup> Section 15(1)

<sup>11</sup> *Report on the Sentencing of Young Offenders*, Sessional Paper, 1 November 1988 (Department of Government Printing, Sri Lanka)

<sup>12</sup> Article 13.1 and 13.2

<sup>13</sup> Article 13.4

to detain a child or young person in an adult gaol should be removed. In addition, Sri Lankan law needs to focus more on alternatives to detention for children and young people.

A fair hearing by an independent and impartial authority is clearly the essence of a proper system of juvenile justice. These norms are clearly articulated in the international instruments.<sup>14</sup> The Beijing Rules in particular, recognise that proceedings should be conducive to the best interests of the child and conducted in an atmosphere of understanding which allows the juvenile to participate in the proceedings and to express himself or herself freely.<sup>15</sup>

Informality of procedures is achieved only partially in Sri Lankan law. Thus, the juvenile court must sit in a different building or room from that which other courts sit,<sup>16</sup> ensuring that the child is shielded from normal court room activity. The court is furthermore required to explain the substance of the offence in simple language.<sup>17</sup> However, these provisions alone do not ensure informality, nor enable the juvenile to participate effectively in the proceedings. Other jurisdictions have explored different ways of ensuring informality of procedures. Thus, they have dispensed with the formal setting of the courtroom, and with the attire of the counsel and the judge. Such options may well be considered by the Sri Lankan legislature.

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<sup>14</sup> Beijing Rules, Article 14.1; CRC, Article 40.2

<sup>15</sup> Article 14.2

<sup>16</sup> CYPO, Section 7(2)

<sup>17</sup> *Ibid*, Section 9



A glaring omission in the Sri Lankan law is that there is no requirement that a child must be legally represented. The CYPO stresses the importance of the role of the parent or guardian in the courtroom.<sup>18</sup> Yet, this alone is insufficient. The CRC lays down that a child should be provided with legal or other assistance.<sup>19</sup> The Beijing Rules include the right to counsel and the right to the presence of a parent or guardian at all stages of the proceedings.<sup>20</sup> A child's right to be heard becomes meaningless without legal representation. It is counsel who can ensure the non-infringement of rights during court proceedings. Furthermore, it is counsel who can examine the prosecution's allegations and prepare the case for the defence. An amendment to the CYPO giving children a right to legal representation appears imperative.

The CRC identifies a child's right to have his or her privacy fully respected at all stages of the proceedings as one of the minimum guarantees that ought to be available to a child.<sup>21</sup> The Sri Lankan law in this respect appears to be satisfactory. Thus, only the members and officers of the court, parties to the case, their attorneys and witnesses and such other persons as the court may specially authorise can be present in the court. Reporting of proceedings is severely restricted<sup>22</sup> and the publication of reports or pictures of proceedings are prohibited.<sup>23</sup>

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<sup>18</sup> CYPO, Section 16. See also Section 9(5)(b)

<sup>19</sup> Article 40.2(b)(iii)

<sup>20</sup> Article 15.1 and 15.2

<sup>21</sup> Article 40.2(b)(vii)

<sup>22</sup> CYPO, Section 11

<sup>23</sup> *Ibid*, Section 20

Both the CRC and the Beijing Rules stress the desirability of diverting the juvenile offender from the judicial process.<sup>24</sup> This objective is only marginally realised in Sri Lanka. The Mediation Boards Act<sup>25</sup> provides that no proceedings can be instituted in a court in respect of certain offences unless the case has already gone before a Mediation Board and the Board has issued a certificate of non-settlement. However, the jurisdiction of the Mediation Board is limited to certain offences. The CYPO, moreover, seems to offend the principle of diversion. The relevant provision states that a Magistrate's Court sitting as a Juvenile Court shall have the jurisdiction to hear and determine any case in which a young person is charged with any offence.<sup>26</sup>

The case for diversion is strong. Relevant considerations should be the nature of the offence, the age and circumstances of the offender, his or her prior record, the services available outside the court system to deal with the offences and the harm that the conviction might cause.

The CRC requires a range of sentencing options to be available in the case of child offenders.<sup>27</sup> In Sri Lankan law, children (i.e., those under the age of 14) and young persons (i.e., those under the age of 16) fall within the ambit of the CYPO<sup>28</sup> and the sentences that can be imposed on them differ from those that can be imposed on adults. Another category of offenders are those between the ages of 16 and 22 who are designated youthful offenders.<sup>29</sup>

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<sup>24</sup> CRC, Article 40.3(b), Beijing Rules, Article 11

<sup>25</sup> No. 72 of 1988

<sup>26</sup> CYPO, Section 4(1)

<sup>27</sup> Article 40.4

<sup>28</sup> Section 88

<sup>29</sup> See Youthful Offenders (Training Schools) Ordinance No. 28 of 1939, Section 16

Under Sri Lankan law, children under 14 years cannot be imprisoned for any offence. Children between 14 and 16 can only be imprisoned when the court finds them to be 'unruly' or 'depraved' (although both these terms are undefined).<sup>30</sup> Institutional and non-institutional alternatives to imprisonment are provided for in the law. Thus, the variety of dispositions that the Convention requires is found in some degree in Sri Lankan law. The institutional options are detention in a remand home,<sup>31</sup> or placement in a certified or approved school for three years.<sup>32</sup> Whilst these institutions are clearly preferable options to prisons, they still convey a stigma that the child will carry for life and it is the non-institutional options which a Juvenile Court magistrate must strive to impose. The non-institutional alternatives are firstly 'fit person' orders. These place the child for three years with a person designated a 'fit person'. A 'fit person' is not defined in the law, except that the relevant section states that 'fit persons' could be relatives.<sup>33</sup> Return of the child to the parents or relatives is another option.<sup>34</sup> This could be under a probation order or a bond for good behaviour. Similarly, discharge upon entering into a recognizance after due admonition is another alternative.<sup>35</sup> Other non-institutional measures such as suspended sentences<sup>36</sup> and community sentence orders<sup>37</sup> are available under the Code of Criminal Procedure Act. Yet, there is some doubt as to whether these sentences which appear in the Code of Criminal Procedure Act are

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<sup>30</sup> CYPO, Section 23(2)

<sup>31</sup> *Ibid*, Section 25(1)

<sup>32</sup> *Ibid*, Section 26(1)

<sup>33</sup> *Ibid*, Section 27(1)(b)

<sup>34</sup> *Ibid*, Section 27(1)(a)

<sup>35</sup> *Ibid*, Section 27(1)(c) and 30

<sup>36</sup> Code of Criminal Procedure Act No. 15 of 1979, Section 306(1)

<sup>37</sup> *Ibid*, Section 18

available to a juvenile magistrate or whether the only sentences that he or she may impose are those in the CYPO. Sri Lankan legal reforms must focus on other non-institutional measures and judicial thinking must give greater emphasis to non-institutional measures rather than institutional measures.

Even if reforms were made to address the shortcomings in the legal provisions applicable to children who are in breach of the criminal law, such as the age of criminal responsibility and the sentencing options, a child caught up in the criminal justice system would still not be adequately protected. Delays in adjudication have particularly adverse consequences on juvenile offenders, especially when they have not been released on bail. The inevitable result is an interruption in their normal schooling and the removal of the children from familiar surroundings.<sup>38</sup> The most recent figures reveal that 99 children were detained in the four remand homes in the country in 1994.<sup>39</sup> Whilst it is conceded that the numbers involved are small, nevertheless long periods in remand homes is contrary to the Beijing Rules.<sup>40</sup> Two hundred and twenty six children were receiving correction in the four certified and one approved school in the country in 1994.<sup>41</sup> These statistics do not indicate a significant rise in the number of children sent to correctional institutions. Nevertheless, the indications are that the non-institutional options identified earlier are not being sufficiently

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<sup>38</sup> See further, *Report on the Implementation of the Convention of the Rights of the Child* (Marga Institute, 1994) p 63

<sup>39</sup> Jayasekera, R.W., "Juvenile Justice, Laws, Policies and Practices," Regional Training Programme, *Juvenile Justice and the Rights of the Child: A Challenge for the 21st Century* (Bangkok, 1994)

<sup>40</sup> Article 13.1

<sup>41</sup> *Supra* n 39

used. According to a senior probation officer, magistrates themselves are not well versed in the provisions contained in the statute law and do not appear to be aware of the range of options available.<sup>42</sup> This observation was corroborated by a magistrate who had for a short time served as a juvenile magistrate. She clearly did not view custodial measures as desirable for children but believed that magistrates had few options available to them.<sup>43</sup> Perhaps one of the reasons for this lack of awareness is that juvenile justice does not receive specific attention in the period of academic or professional study.

Another area of concern is the actual training provided to children in the certified schools. This training is not intended to be purely vocational and is said to have as its aim the full development of the child's personality. Yet, whether this can be realised with the available resources is doubtful. The writer visited a correctional institution in Rayong, Thailand and observed the facilities and instruction available to children within the reform school. The emphasis was on vocational training, with the girls receiving different training to the boys. Securing employment for the children and giving them the necessary skills for employment was clearly the aim of the staff. Releasing them without the requisite skills was viewed as being tantamount to inducing them to going back to a life of crime. Light engineering, pottery, toy making, embroidery and the making of silk flowers were some of the skills the children acquired. Children who were talented in music were taught to play musical instruments

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<sup>42</sup> Interview, Probation Officer, Department of Probation and Child Care, 17 December 1994

<sup>43</sup> Interview, 18 September 1994

and some were being trained as vocalists. Moral education, basic language skills and mathematics also formed part of the curricula. It is the view of the author that our certified schools do not have the capacity to provide the kind of training a child needs to become effectively integrated into society. More feasible measures ought to be explored, such as greater use of probation and 'fit person' orders. Indeed, in 1988 the Wimalaratne Committee<sup>44</sup> observed that probation should be given a prominent place in the rehabilitation of juvenile offenders.<sup>45</sup> The Committee also recommended that probation orders should be replaced by supervision orders, perhaps because of the adverse connotations attached to the word probation. Such supervision orders could have numerous conditions attached to them and could therefore cater to the specific needs of a particular child.<sup>46</sup> It is strongly advocated that in general, the child offender should be treated in the context of the family and the community. This approach is based upon the premise that deviant behaviour of juveniles stems from the family environment and the community. If this environment can be improved or stabilised the juvenile would cease to be a threat to society. This method of treatment, moreover, has the advantage of being cost effective.

### **3. Abused and Sexually Exploited Children**

Articles 19 and 34 of the Convention deal with child abuse and sexual exploitation. A significant feature of the provisions

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<sup>44</sup> *Report on the Sentencing of Young Offenders*

<sup>45</sup> *Ibid.*, p 10

<sup>46</sup> *Report on the Sentencing of Young Offenders*, Draft Legislation, Appendix E, Section 70



is the emphasis on the measures a state is required to take to prevent child abuse and sexual exploitation. Thus, Article 19(2) requires a state to provide an effective procedure for the identification, reporting, referral and investigation, treatment and follow up of instances of child maltreatment. The state is required by Article 34 to protect the child from all forms of sexual exploitation and sexual abuse. In particular, it is required to take all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or unlawful sexual practice, and the exploitative use of children in pornographic performances. The Sri Lankan law must be assessed against these standards.

The Sri Lankan law has no statutory provisions which deal specifically with child abuse. Nevertheless, certain provisions in the CYPO are broad enough to encompass child abuse.<sup>47</sup> Formulated at a time when child abuse had not received national or international attention, the provisions deal only with certain aspects of the phenomenon. The more detailed provision of the two, Section 71, encompassing both physical and mental abuse, was never brought into operation.<sup>48</sup> Certain provisions of the Penal Code,<sup>49</sup> too, are amenable to dealing with child abuse.<sup>50</sup> Thus the sections on criminal force, assault and grievous hurt could be utilised for dealing with certain forms of child abuse. To be more effective, however, they need to be amended and redrafted to cover a wider

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<sup>47</sup> Sections 34 and 71

<sup>48</sup> See Part V, CYPO and particularly Section 71

<sup>49</sup> No. 2 of 1883. See Section 311

<sup>50</sup> See Section 311

range of acts of violence. As presently formulated they are too narrow in scope.<sup>51</sup>

Sexual exploitation of children, as the law currently stands, has to be dealt with in the main by various provisions in the Penal Code. Prostitution is undefined in the existing legislation. But procuring or attempting to procure a girl to become a prostitute is an offence.<sup>52</sup> A person who has the custody of a girl who is seduced or led into prostitution is liable to prosecution.<sup>53</sup> A magistrate who receives information upon oath by any probation officer that there is reasonable cause to suspect that an offence has been committed in respect of any girl may issue a warrant authorising a search for her. If it is found that the offence has been committed she may be detained in a place of safety for a period not exceeding seven days until she can be brought before a magistrate.<sup>54</sup> Where an adult is found guilty of the offence of causing the seduction or prostitution of a girl, the girl may be returned to her relatives or parents or be placed with a 'fit' person of society.<sup>55</sup> Sanctions moreover can be applied against police officers and *grama seva niladaris* for neglect of their duty.<sup>56</sup> The Brothels Ordinance<sup>57</sup> makes it an offence for a person to manage or act or assist in the management of a brothel. Tenants, occupiers and owners of such premises who have knowledge of the use of such

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<sup>51</sup> See *Technical Committee Report on Child Abuse, Aspects of Substantive Law*, Ministry of Reconstruction, Rehabilitation and Social Welfare (1994)

<sup>52</sup> Penal Code No. 2 of 1883, Section 360A

<sup>53</sup> Vagrants Ordinance, Section 11

<sup>54</sup> *Ibid*, Section 17

<sup>55</sup> *Ibid*, Section 14

<sup>56</sup> *Ibid*, Section 20

<sup>57</sup> No. 5 of 1889 (as amended)

premises for the purposes of running a brothel can also be liable under the Ordinance.

These provisions on prostitution need substantial revision if they are to be effective in deterring potential offenders and dealing with offenders. Firstly, the statutory provisions must deal with male prostitution, which currently falls outside the relevant statutory provisions. Secondly, the offence should be redefined to cover all forms of behaviour aimed at inducing a child to become a prostitute and subjecting a child to any form of sexual abuse. In addition, the present sentences are inadequate and need to be revised.<sup>58</sup>

The laws relating to rape and incest require revision if children are to be adequately protected. One effective way of combating child rape is to revise the age specified in the rape law for the offence of statutory rape.<sup>59</sup> According to the rape laws, rape is committed by a man when he has sexual intercourse with a girl under the age of 12 whether she consents to the intercourse or not. The Technical Committee identified an urgent necessity to revise the age of 12 years to a higher limit.<sup>60</sup> Apart from this the Sri Lankan law does not stipulate a minimum penalty for rape. The Technical Committee in their recommendations suggested a minimum penalty of 5 years and a mandatory fine where the rape victim is a girl under 16 years.<sup>61</sup> The recommendation, if implemented, would entrench the idea that rape is a serious crime which ought to be dealt with severely.

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<sup>58</sup> *Technical Committee Report on Child Abuse*, p 7

<sup>59</sup> See Section 363, Penal Code

<sup>60</sup> *Technical Committee Report on Child Abuse*, p 2

<sup>61</sup> *Ibid*, p 3

Incest is another area of Sri Lankan law that needs to be addressed. Article 19 of the CRC clearly requires a state to take appropriate measures against all forms of abuse, including sexual abuse whilst the child is in the care of parents, legal guardians or any other person who has the care of the child. Incest undoubtedly is difficult to detect given that it often takes place in a functional family. The stigma attached often results in family members concealing its existence to the law enforcing authorities. Apart from the difficulties encountered in detecting incest, presently incest is not an offence under the Penal Code. It is an offence under the marriage laws of the country and therefore conceived of as a 'lesser' offence.<sup>62</sup> The Sri Lankan law has its origins in 19th century English common law, which did not view incest as a crime. However, whilst this remains unaltered in Sri Lankan law, it has been changed in England where incest is clearly a criminal offence.

If the Sri Lankan child is to be protected from sexual abuse both within family and outside it, clearly, the law requires amendment. Incest must be treated as a serious crime which warrants appropriate criminal sanctions.

It would seem then, that the Sri Lankan law needs substantial revision if it is to deal effectively with the abused and sexually exploited child. The present laws, which were drafted in an era when child abuse and sexual exploitation did not receive public attention, are inadequate to deal with the level of depravity that child prostitution and sexual exploitation have reached. Urgent legislative reforms and more effective enforcement measures are required.

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<sup>62</sup> Marriages (General) Ordinance No. 19 of 1907, Section 17

The ground situation relating to abused and sexually exploited children appears to be far worse than in the case of children who are in breach of the criminal law. Perhaps this is because in the case of children in breach of the criminal law there is a considerable body of child-centred legislation.

An alarming increase in child rape was detected in 1994. Of the 141 cases of rape reported in the first 10 months in 1994, 89 cases involved children.<sup>63</sup> Quite apart from the offence of rape, over 100 serious crimes against children were reported in the first quarter of 1994. These included child pornography, infanticide, murder and torture.<sup>64</sup>

Detection of child abuse both within the family unit and outside it requires a community that is conscious of the evils of child abuse and a police force that has been conscientised on the impact that child abuse has on the development of the child. The role that NGOs can play in conscientising the community cannot be over emphasised. PEACE, a campaign to protect the environment and children which is affiliated to ECPAT (End Child Prostitution in Asian Tourism) has already embarked on such a project. The police have responded to this rapidly rising phenomenon of child abuse by setting up child abuse desks both at police headquarters as well as in other police units in the country. There is a necessity to ensure that these desks are manned by trained personnel, counsellors and committed persons.

Detection alone is insufficient. Once a detection is made the process of prosecution must begin, culminating, if the

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<sup>63</sup> *The Island*, 31 January 1995

<sup>64</sup> Statistics provided by the police in 1994

accused is found guilty, in a sentence which is compatible with the seriousness of the crime perpetrated. Some recent cases highlighted in the newspapers indicate several problem areas relating to the reporting, investigation and prosecution of even serious sexual offences. In October 1994 the newspapers reported an incident of an alleged rape by a senior police officer of his niece. The report also stated that the victim had refrained from reporting the incident because of the position held by the alleged perpetrator.<sup>65</sup> A further report pertaining to the same case revealed that the victim had later taken her life and that no action had been taken on the original complaint. The newspaper report further revealed that the Criminal Investigations Department (CID) was now conducting an investigation into whether the suicide was connected to the alleged rape incident.<sup>66</sup> The case highlights the difficulties encountered in this case by a 16 year old girl child in reporting a case of sexual abuse and also shows at best the tardiness of the investigative process.

Of serious concern was another case in 1994, where an 11 year old girl was allegedly raped by a retired police superintendent. The matter was brought to court but during the course of the inquiry the AG intervened and successfully applied to have the case discharged on the grounds of insufficient evidence. He, however, instructed the CID to conduct further investigations and as a consequence the case was reopened.<sup>67</sup> Quite apart from the alleged sexual offence, the accused was also apparently in breach of the employment

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<sup>65</sup> *The Island*, 11 October 1994

<sup>66</sup> *The Island*, 26 January 1995

<sup>67</sup> *The Island*, 11 June 1994



laws of the country and no action appears to have been taken against him.

Quite apart from alleged sexual abuse in the context of the extended family as in the first case discussed, and alleged abuse in the context of the employer/employee relationship as in the second case discussed, there is evidence that children are involved in prostitution on a large scale in Sri Lanka. This has been associated with a rapid growth in tourism. A recent report gives the figure of child prostitutes as 30,000.<sup>68</sup> Poverty, disruption of family life, absence of parental control, ignorance and indifference to children's welfare are suggested as the main causes for child prostitution. Earlier the victims were mainly male children. However, recent reports suggest that the number of young girls engaged in child prostitution has increased from a negligible number to nearly 30% of the total number of child prostitutes.<sup>69</sup> Another matter of concern is the widespread use of children in the making of pornographic films.<sup>70</sup>

The response of government agencies to these problems is inadequate. The Department of Probation and Child Care in collaboration with the Ministry of Education and the Tourist Board has been implementing public information and awareness programmes to combat child prostitution. Each programme deals with 100 children who dropped out from school and their parents.<sup>71</sup> Such measures will, however, need to be strengthened and extensive involvement of non-

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<sup>68</sup> UNICEF, *Progress of Nations* (New York, 1994) p 56

<sup>69</sup> *The Sunday Times*, 10 July 1994

<sup>70</sup> *The Island*, 9 October 1994

<sup>71</sup> *Report on the Implementation of the Convention on the Rights of the Child* 1994, p 57

governmental agencies will be of vital importance for their success.

The sentences imposed in the few cases that have reached the courts appear to be far too lenient, given the seriousness of the offences. A French national who had engaged in homosexual acts with a number of boys was sentenced to a fine of Rs. 1,500 and a suspended sentence in the early part of 1994.<sup>72</sup> A local man who had abused two 12 year old boys was fined and given a suspended sentence. A member of the police found guilty of committing a sexual offence on a child was sentenced to a four year prison sentence but released on probation.<sup>73</sup>

In the light of these sentences the recommendations of the Technical Committee assume importance. The Committee recommended certain minimum penalties in the case of serious sexual offences and specific penalties in relation to a number of other offences. Such legislative changes are vital to arrest the current trend of over-lenient sentences.

#### **4. Employed Children**

Article 32 of the CRC asserts the right of a child not to be economically exploited. Economic exploitation is undefined but reference is made to performing work "that is likely to be hazardous or to interfere with the child's education, or be harmful to the child's health or physical, mental, spiritual, moral or social development."<sup>74</sup> State

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<sup>72</sup> *The Island*, 3 February 1994

<sup>73</sup> *The Island*, 5 December 1993

<sup>74</sup> Article 32.1

Parties are requested to take legislative, administrative, social and educational measures to ensure the implementation of this Article. They are required to provide a minimum age or ages of employment, regulate hours and conditions of employment and to provide appropriate penalties or other sanctions to ensure the effective enforcement of the Article.<sup>75</sup>

The prevailing legislation in Sri Lanka conforms to some extent with Article 32 of the CRC. There are various legal provisions which stipulate different minimum ages of employment depending on the nature of the work.

The minimum age of employment in Sri Lanka is 12. This is established by regulations made under the principle Act dealing with the employment of women, young persons and children: namely, the Employment of Women, Young Persons and Children Ordinance.<sup>76</sup> These regulations also list a series of occupations in which children over the age of 12 but under the age of 14 cannot be employed. The underlying premise of the legislation and the regulations is that children can be employed subject to an absolute bar on children below the age of 12. Children<sup>77</sup> over and above that age, can be employed in certain categories of employment. In the case of older children there are less restrictions. In the case of children over 14 defined as 'young persons'<sup>78</sup> there appear to be no provisions regulating their conditions of work except that they cannot be employed in the night.<sup>79</sup>

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<sup>75</sup> Article 32.2

<sup>76</sup> No. 47 of 1956

<sup>77</sup> A 'child' is defined in the Employment of Women, Young Persons and Children Ordinance as a person under 14 years of age. See Section 34

<sup>78</sup> A 'young person' is defined in Section 34(1) as a person who has attained the age of 14 but is under the age of 18.

<sup>79</sup> *Ibid*, Section 2(1). There are limited exceptions to this prohibition. See Section 3(3) and 3(4)

The occupations prohibited for children between the ages of 12 and 14 include fishing, employment in plantations and street trading. Children over the age of 14, as young persons, presumably can be employed in these sectors.

The legislation also attempts to regulate children's conditions of employment. No child shall be employed before the close of school hours nor between 8 p.m. and 6 a.m. Children may not be employed for more than two hours on any day on which they are required to attend school and nor may they lift, carry or move anything so heavy as to be likely to cause them injury or be engaged in any occupation likely to be injurious to their life.<sup>80</sup>

Unpaid family work is an essential feature of Sri Lankan society. The law as it stands does not attempt to regulate such employment. This is contrary to the provisions in the Convention which seek to protect a child from economic exploitation irrespective of the source from which the exploitation emanates.

Children in domestic service are of particular concern in Sri Lanka. Statistics on children employed in domestic service have not been gathered systematically, and only estimates appear to be available. The use of children in domestic service is becoming an increasingly common occurrence in urban areas where children are employed in all types of households and not just in the homes of the affluent.<sup>81</sup> There appears to be no doubt that child labour

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<sup>80</sup> Employment of Women, Young Persons and Children Ordinance, Section 13(1)

<sup>81</sup> Goonesekere, S.W.E., *Child Labour in Sri Lanka: Learning from the Past* (ILO Child Labour Collection, Geneva, 1993)

is linked with widespread poverty. More than 75% of such children are from families in the plantation sector and urban areas.<sup>82</sup> Here the potential for abuse is greater than for children who are engaged in unpaid family labour. Whilst detailed regulations exist about the conditions of labour there is no proper enforcement mechanism for these regulations. These regulations are in practice a dead letter.

Some of the problems of law enforcement in this area of domestic employment may result from the fact that there appear to be three separate departments involved in this process: the Department of Labour, the Police and the Department of Probation and Child Care. The Commissioner of Probation and Child Care in a press interview revealed that 1,400 petitions regarding child labour were received in the latter half of 1993 alone, but that the Department had no viable means of investigating these complaints.<sup>83</sup>

In addition to economic exploitation, the potential for other forms of abuse also exists in situations where children are employed as domestic servants. The child is helpless, living in an alien environment without anyone to turn to. His or her parents are quite often in connivance with the employers and may well be reluctant to remove the child. The law enforcement agencies are ineffective and there is therefore no effective redress. Newspaper reports reveal that the types of abuse committed against young domestic workers take many forms, with gross physical abuse inflicted on them as punishment.<sup>84</sup>

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<sup>82</sup> *Ibid*, p 11

<sup>83</sup> *Daily News*, 7 June 1994

<sup>84</sup> *Lankadeepa*, 1 March 1994; *The Sunday Leader*, 11 September 1994

The Technical Committee in their report on child employment<sup>85</sup> recommended a minimum age of employment of 15 years. This was not to be applicable to children working with their parents or custodians, in family activities after school hours. The Committee also recommended the establishment of a monitoring committee at provincial level. This recommendation is an attempt to strengthen the enforcement of the laws. A further recommendation of the Committee is that the violation of child labour laws should come within the jurisdiction of the Juvenile Courts and that child victims should be treated as 'protected persons.' It follows necessarily that such persons should not be treated as offenders. Every effort should be made to ensure that such children are returned to their parents or placed in foster care with registered custodians. This option is already available under the Adoption of Children Ordinance, but is little known of, and therefore seldom utilised. The report also advocates certain preventive measures including public awareness programmes. These have met with success in the past but continuity is necessary.

## 5. Conclusion

This survey of three categories of children - those in breach of criminal law, those who have been abused and sexually exploited, and those who are employed - demonstrates the need for legislative reform and for more effective implementation of the laws. In the area of juvenile justice, changes in sentencing patterns are necessary, as are changes

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<sup>85</sup> *Report on Child Employment*, Ministry of Reconstruction, Rehabilitation and Social Welfare (1993)



to the lawful age of criminal responsibility and pre-trial and trial procedures for children. A movement away from institutionalisation to correction within the community needs to be given serious consideration.

The area of child abuse reveals the need for certain legislative changes, and the need for a greater determination to detect and prosecute these cases. This aspect has received little attention. It is well documented now that abused children are more likely to develop violent criminal behaviour. Other studies reveal that adults who were abused are likely to abuse or neglect their own children. Revitalising the Probation and Child Care Department, in-house training, volunteer probation officers and greater use of the NGO network are also vital if Sri Lanka's children are to be vested with the rights enshrined in the Convention.

Implementation is the crux of the problem in cases of child labour. The legislation and regulations in force are not implemented. Legislative changes alone, therefore, would not suffice.

## **XVI**

# **The Status of Women in Sri Lanka**

### **1. Introduction**

The chapter assesses the human rights status of Sri Lankan women. It questions the extent to which ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1981 has been translated into the standards and procedures necessary to effect human rights norms into practice.

Any analysis of the status of women's human rights necessarily implies a general overview, rendering less visible the status and experiences of a particular group of women. Thus, it is accepted that while the term "women" is used as an inclusive descriptor, this is not necessarily accurate, and detailed analysis of the specific experiences of sub-categories or groups of women are beyond the scope of this chapter. Second, in certain areas the difficulties encountered by women remain invisible. For example, statistical information on violence against women is inadequate. Data on matters such as the incidence of rape, prostitution and domestic violence is limited, and this raises issues associated with the extent to which women are prepared to report such incidents to relevant authorities. Moreover, there is a paucity

of information on the extent to which relevant authorities are prepared to act upon allegations of violence. In addition, the public/private dichotomy has camouflaged the experiences and problems of women, especially in the domestic sphere.

Notwithstanding these observations, the well-being of women in Sri Lanka is ascertained by considering indicators pertaining to issues such as socio-economic status, educational qualifications and health; analysing relevant legislative provisions and by examining pertinent reports and literature.

The major texts for the standards and requirements against which the status of women are measured are CEDAW, the Constitution of Sri Lanka and the Sri Lankan Women's Charter (1993). In addition, this evaluation is underscored by the provisions and articles contained in the ICCPR, the ICESCR, and the Declaration of the World Health Organization (WHO). The status of women is evaluated within the following categories:

- (i) Political and Civil Rights
  - Constitutional provisions
  - Other instruments: national and international
  - Participation in public life
- (ii) Economic and Social Rights
  - Marriage, family and divorce
  - Health status
  - Levels of education
  - Economic participation and labour law
- (iii) Violence against women

What emerges is a broad and general overview of the current situation of women, wherein breaches of articles contained in CEDAW are identified.

## **2. Political and Civil Rights**

### **2.1 Constitutional Provisions**

Article 12(2) of the Sri Lankan Constitution provides that "No citizen shall be discriminated against on the grounds of ... sex ..." Moreover, Article 12(4) states that "Nothing in this Article shall prevent special provision being made by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons." Additionally, the Supreme Court of Sri Lanka is entrusted with adjudicating fundamental rights cases. To date, no case on sex discrimination has been filed before the Court.

### **2.2 Other Relevant National Instruments**

- \* Matrimonial Rights and Inheritance Ordinance 1876
- \* Married Women's Property Ordinance 1923
- \* Maternity Benefits Act No. 43 of 1985 (as amended)
- \* Extension of Maternity Benefits to Public Sector by Administrative Regulation P.A. Circular 22/98, 1988
- \* Children's Charter, 1992 (approved by executive)

Of relevance is the Sri Lankan Women's Charter which was formulated with government approval and NGO participation, where standards of gender equity in relation to policy formulation are clearly stated. The Charter is

expected to clarify executive action in the sphere of women's activities and to provide standards with regard to women's activities in different parts of the country. However, the Charter does not have statutory authority, and proposals to confer the Women's Charter with such authority are welcomed.

The Charter has established a National Committee on Women which is empowered by the executive to monitor the application and progress of the articles of the Charter, as well as receive and refer complaints of gender discrimination to the relevant authority. Effective exercise of these functions to the benefit of women would be enhanced if the Committee had substantial legal powers. There is an expectation that the Committee will be replaced by a powerful commission during the course of the next few years.

### **2.3 Relevant International Instruments**

- \* CEDAW, 1979
- \* UN Convention on the Nationality of Married Women, 1957
- \* ILO Convention (No. 45) concerning the Employment of Women on Underground Work in Mines of all Kinds, 1935
- \* ILO Convention (No. 81) concerning Labour Inspection in Industry and Commerce, 1947
- \* ILO Convention (No. 41) concerning Employment of Women during the Night, 1934
- \* ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951

- \* ILO Convention (No. 103) concerning Maternity Protection, 1952
- \* General Assembly Resolution on Violence Against Women (Including its Causes and Consequences) 1993

The Constitution and these instruments, both national and international, frame the rights and means of redress available to women.

## 2.4 Participation in Public Life

Analysis of data regarding women in public life indicates that women continue to be poorly represented. Of cabinet level ministers, women have constituted for less than 10% since 1955.<sup>1</sup>

**TABLE 1 Cabinet Level Ministers**

|      | Total | Male | Female | %    |
|------|-------|------|--------|------|
| 1980 | 26    | 25   | 1      | 3.8  |
| 1985 | 28    | 26   | 2      | 7.1  |
| 1990 | 26    | 25   | 1      | 3.8  |
| 1993 | 29    | 28   | 1      | 3.4  |
| 1994 | 23    | 20   | 3      | 13.0 |

Similar proportions of women participate as non-cabinet level ministers.

<sup>1</sup> The Sri Lanka National Report to UN Fourth World Conference on Women (draft) (Ministry of Women's Affairs, Colombo, 1994). The authors wish to thank Mrs. Lalitha Dissanayake for her assistance in providing statistical information. Page numbers from the draft report have not been provided.



**TABLE 2 Non-Cabinet Level Ministers**

|      | Total | Male | Female | %   |
|------|-------|------|--------|-----|
| 1980 | 39    | 39   | 0      | 0   |
| 1985 | 42    | 42   | 0      | 0   |
| 1990 | 52    | 47   | 5      | 9.5 |
| 1993 | 52    | 47   | 5      | 9.5 |
| 1994 | 31    | 28   | 3      | 9.7 |

Similar proportions of women participate as non-cabinet level ministers. Apart from a few exceptions women have not generally served as cabinet secretaries, although 7 (13%) of the 55 non-cabinet level secretaries were women in 1993.<sup>2</sup>

Representation of women in local government councils is similarly small. In 1983, of those elected to Municipal Councils, three were women which comprises 1.3 per cent. The proportion of women had increased marginally to 2.9% in 1993. This trend is reflected in the 247 Urban Councils where 6 members (1.7%) were women in 1993. Of the 12 Mayors of Municipal Councils, only one was a woman in 1991.<sup>3</sup>

Representation of women in the judiciary in 1993 was somewhat higher where 23% of judges in the lower courts (district/magistrate/primary) were women. However, the proportion of women in the superior courts (High/Court of Appeal/Supreme) was significantly lower (4.7%). These low rates of representation are questionable when 44% of the attorneys at the Bar were women.<sup>4</sup>

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<sup>2</sup> *Ibid*

<sup>3</sup> *Ibid*

<sup>4</sup> *Ibid*

Low levels of representation of women in these areas of public life where there are no legal barriers attest to the pervasiveness of systemic gender discrimination and indicate the operation of a "glass ceiling." The factors that impede women's participation in public life are diverse, numerous and interlocked. On the one hand, it is posited that the pre-selection and nomination of women as candidates either as elected members or on the National List by political parties is not necessarily based on issues such as merit. On the other, it is likely also that, in the light of family responsibilities and gender rates, fewer women aspire to high public office.

Article 7 of CEDAW deals with women's participation in public and political life. More specifically Article 7(b) provides that State Parties shall ensure women:

*the right to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.*

Despite the offices held by women, the representation of women in the political sphere in Sri Lanka is not equitable. Thus, an examination of the various factors that contribute to the current low levels of participation in political life is warranted, just as the development of strategies that encourage women to actively participate in the political processes of the country is necessary. Such strategies would comprise the dissemination of information regarding the benefits of such participation, as well as the removal of the constraints and barriers which impede equitable participation.

### 3. Economic and Social Rights

#### 3.1 Marriage, Family and Divorce

Despite claims that laws do not interfere with relations in the private sphere, legislation pertaining to issues such as property, inheritance and marriage underscore the status of women in the domestic arena. As has been observed by Goonesekere, "...the pluralism in Sri Lankan family law is an obstacle to the introduction of legal coherence, and the articulation of common legal values which conform to the concept of gender equality."<sup>5</sup>

Four separate systems of law govern family relations:

- \* General
- \* Kandyan
- \* Thesavalamai
- \* Muslim

It has been posited that discrepancies between the laws regulating family relations reflect the nation's commitment to ethnic and religious pluralism. In practice, however, the interactions between the laws, and the laws themselves have constrained the achievement of gender equality. What follows is a brief appraisal of some of the more obvious discrepancies.

With respect to marriage, non-Muslim women receive similar treatment in legislation relating to contracting a legal marriage.

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<sup>5</sup> Goonesekere, S.W.E., "Status of Women in the Family Law of Sri Lanka" in Kiribamune, S. and Samarasinghe, V. (eds), *Women at the Crossroads: A Sri Lankan Perspective* (International Centre for Ethnic Studies, 1990)

However, under Kandyan and General laws the age of consent for females at 12, is lower than that for males at 14. It is questionable whether this disparity can be justified in the light of Sri Lanka's ratification of CEDAW, the CRC, and the Constitution. Such disparities, and the provision of such a low age for the marriage of females, reinforces assumptions that the primary role for females is that of motherhood.

Provisions regarding consent differ under the Marriages (General) Ordinance (1907), and the Kandyan Marriage and Divorce Act (1952). The former provides that 18 is the age of consent for both parties, while the latter reinforces notions about female roles and sexuality by stipulating that the age of consent for women is lower at 16 than that for men at 18.

The extent to which attitudes and views about women influence legislative provisions is similarly apparent in the Muslim Marriage and Divorce Act. Under this Act a girl may be married upon reaching puberty, and if under 12 the consent of the *Quazi* is required. The Act neither stipulates an age at which a male may be married, nor is there a requirement for consent. Females, however, require their guardian's consent to marry at any age, unless dispensed with by the *Quazi*. Further, although Muslim women are forbidden from marrying a non-Muslim under the Act, Muslim men are not. Moreover, while the Marriages (General) Ordinance, Kandyan Marriage and Divorce Act and the Thesavalamai recognise only one legal marriage at any one time, the Muslim Marriage and Divorce Act permits polygamy. In recent times, the problem of fundamentalism in the Muslim community has made some of these provisions intractable.

This, along with additional restrictions on dress and movement are disturbing new realities faced by the Muslim community. Similar differences by gender and between the laws emerge in relation to divorce. The Marriages (General) Ordinance and the Civil Procedure Code allow either party to file a petition for divorce on the grounds of adultery, malicious desertion, incurable impotency or legal separation for less than two years or actual separation for a period of seven years or more. The Kandyan Marriage and Divorce Act discriminates against women in that adultery alone is an insufficient basis for a woman to file for divorce. It must be coupled with incest or gross cruelty. It is worth noting that the Act allows divorce on the basis of mutual consent and an inability to live happily together. Under Muslim law, the man needs no reason to divorce his wife.

Sinhala women, women governed by the Thesavalamai and Muslim women have independent property rights under their laws. The rights of Muslim women are, however, constrained by the limitations concerning inheritance delineated in Islamic law. As has been observed by Goonesekere, constraints not found in customary laws have been introduced by statutes regulating inheritance rights. Thus, "the concept of forfeiture of a married daughter's rights of inheritance in family property operates to prevent certain Sinhala and Tamil women governed by these systems from having the same inheritance rights as male heirs."<sup>6</sup>

Discrepancies between the laws are evident with respect to the division of property at the dissolution of marriage.

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<sup>6</sup> Goonesekere, S.W.E., "Women and Law" in *Status of Women (Sri Lanka)* (Ministry of Health and Women's Affairs, 1993)

Under the Married Women's Property Ordinance, each party recovers what was initially owned by them. A trend evident in recent decisions of the courts is the recognition of the contributions made by one spouse towards property which is owned by the other. Under Kandyan law the right of married women to enjoy separate property rights have been conserved by the courts.<sup>7</sup> The Muslim Marriage and Divorce Act provides that the women's dowry must be recovered within three years of the dissolution of marriage. It also provides that a woman can claim her dowry at any time during her marriage.

The brief appraisal of the four systems of law governing personal relations indicates that significant gender disparities or inequalities exist. The pluralistic approach adopted in Sri Lanka with respect to family law has fostered patriarchal values, and constrained the implementation of an egalitarian approach to the rights of women with the private sphere. The constitutional guarantees on fundamental rights are limited since review of existing legislation which is discriminatory is not provided. The laws governing personal relations breach Article 5(a) of CEDAW which provides that State Parties shall take all appropriate measures:

*To modify the social and cultural patterns of conduct of men and women, with a view of achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.*

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<sup>7</sup> See *supra* n 5, p 165



### 3.2 Health Status

Article 12(1) of the CEDAW requires the adoption of appropriate measures to eliminate discrimination against women in the field of health care. More specifically, Article 12(2) provides that:

*State parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*

The extent to which appropriate health care is provided and the access to these services is commonly ascertained by factors such as rates of morbidity and mortality; ratios of doctors and nurses to the population; and the proportion of the GDP on health.

In order to facilitate comparison with the status of women in other developing countries, data published in *The Human Development Report 1994* are used. The human development index is obtained by "combining indicators of life expectancy, educational attainment and income into a composite."<sup>8</sup> Of the developing countries, using the human development index, Sri Lanka is ranked 90 and falls within the category of medium human development. According to the Report, between 1988 and 1990 over a three-quarter of pregnant women (86%) received pre-natal care. During the same period rates of pre-natal care were lower for medium development

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<sup>8</sup> *The Human Development Report*, United Nations Development Programme (UNDP) (Oxford University Press, Delhi, 1994) p 90

countries such as Thailand (53%), Philippines (77%) and Malaysia (56%).<sup>9</sup> It is noted that Sri Lanka has a Maternal and Child Health Programme which is run by the Department of Health. Trained domiciliary care at delivery is part of the Maternal Health Service commenced in 1926, and in 1992 it is estimated that 6,000 public midwives visited new mothers at their homes.<sup>10</sup>

Notwithstanding this, the health status of pregnant women is poor. A significant number of pregnant women in Sri Lanka were found to be anaemic. Between 1975 and 1990 almost a two-third of pregnant women (62%) in Sri Lanka were anaemic, whilst the figures for Thailand (52%), Philippines (48%) and Malaysia (34%) were lower.<sup>11</sup>

Although a significant proportion of births was attended by medical personnel (85%), the maternal mortality rate is 180 per 100,000 live births. While high rates of maternal mortality are a consistent trend among developing countries, it is noted that rates fluctuate from between 5 and 20 for countries such as Canada, Japan and New Zealand. Most of these deaths may be prevented by ensuring access to safe and affordable family planning; offering the most basic support during pregnancy and delivery; and, the option of referrals to clinics or hospitals for women with evident complications.<sup>12</sup>

Increasingly of relevance to the health status of women is the growing incidence of HIV and AIDS. It has been estimated that the cumulative effect of HIV - infected people

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<sup>9</sup> *Ibid*, p 150

<sup>10</sup> See *supra* n 1

<sup>11</sup> *The Human Development Report*, p 150

<sup>12</sup> *Ibid*, p 150

in the world is 15 million with more than 12.5 million in developing countries. In 1993 of the 43 HIV+ cases reported, 11 were women. Then, the female - male ratio was 1:3, while in 1990 the ratio was 1:10. It has been summarised that the majority of women contacted the virus through their spouses or as migrant domestic workers. A smaller proportion were commercial workers. These trends confirm the vulnerability of women, and indisputably warrants, in the first instance, the formulation and comprehensive dissemination of preventive measures.<sup>13</sup>

Access to health care is limited when the ratio of doctors and nurses to the population is considered. In Sri Lanka the ratio is 7,140 individuals per doctor. The ratios for Thailand are 5,000:1; Philippines 8,330:1; and India (low human development) 2,440:1. The ratio of nurses to the population in Sri Lanka is 1,400:1, and is relatively lower in Thailand 910:1, and Malaysia 690:1.<sup>14</sup>

In 1960 Sri Lanka spent 2% of the Gross National Product (GNP) on health. By 1990 this had decreased to 1.8 per cent. Conversely public expenditure on health in similar countries increased during the same period. For instance, in Thailand expenditure increased from 0.4% in 1960 to 1.1% in 1990.<sup>15</sup>

According to the WHO, the well-being of the community is necessary for the enjoyment of life and liberty. Access to safe water and sanitation are critical components of well

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<sup>13</sup> *Ibid*, p 28

<sup>14</sup> *Ibid*, p 152

<sup>15</sup> *Ibid*, p 152

being, and are as important as access to health services. However, during 1989-91, less than three-quarters of all Sri Lankans had access to safe water (71%) and sanitation (60%). The figures for Malaysia were 90% and 72%, and for Thailand 76% and 74% respectively.<sup>16</sup>

Sri Lanka's commitment to improving the health status of all women is unequivocal, as demonstrated by the fact that 90% of Sri Lankans were able to access health services during 1989-91. Significant improvements are not only possible, but warranted.

### 3.3 Levels of Education

High rates of literacy have been a characteristic of Sri Lankan society. Analysis of rates of illiteracy by gender, however, show that rates of illiteracy are significantly higher for women.

**TABLE 3 Levels of Illiteracy by Gender and Age<sup>17</sup>**

| Age     | 1985<br>Women % | 1985<br>Men % | 1992<br>Women % | 1992<br>Men % |
|---------|-----------------|---------------|-----------------|---------------|
| 15 - 24 | 12.5            | 11.0          | 5.5             | 7.5           |
| 25 - 34 | 12.5            | 9.0           | 10.5            | 10.0          |
| 35 - 44 | 18.5            | 10.0          | 12.5            | 7.5           |
| Over 45 | 40.5            | 16.0          | 36.5            | 15.0          |

<sup>16</sup> *Ibid*, p 132

<sup>17</sup> Data in 1992 excludes the North East. See *supra* n 1.

An analysis of levels of illiteracy by age shows that gender disparities narrow in the 25 to 34 age cohort. This suggests that the provision of education is reaching low socio-economic groups. During 1992/93, almost two-thirds (57.9%) of 12 to 13 year olds were enrolled.

The mean years of schooling for males was 8 years, and 6.3 years for females in 1992,<sup>18</sup> whereas the mean years for Malaysia were 5.9 and 5.2, and for Thailand at 4.4 and 3.4 years respectively.<sup>19</sup> Although Sri Lanka has one of the highest averages for medium development countries, it has not been possible to achieve even universal primary education despite four decades of positive education policies.

Reasons for gender discrepancies in the years of schooling completed by males and females may be attributed to socio-economic and cultural variables. To this extent, it may be necessary to develop strategies that target areas where there are low rates of participation, high rates of drop-outs, and poor performance in university entrance examinations, in order to increase levels of schooling.

Analysis of enrolments in professional and vocational degrees or diplomas suggests the influence of gender role assumptions. While a significant proportion of those enrolled in dentistry (48.2%), law (52.9%) and medicine (42.1%) are women, significantly smaller proportions of women are enrolled in

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<sup>18</sup> *The Human Development Report*, p 138

<sup>19</sup> *Ibid*, p 138

engineering (11.9%) and in professional science based courses (32.1%).<sup>20</sup>

Article 10 of CEDAW provides that State Parties shall take appropriate measures to eliminate discrimination in education. Importantly, Article 10(c) requires:

*the elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help achieve this aim...*

While Sri Lanka has implemented measures that seek to ensure that education is provided on the basis of gender equity, it is necessary now to encourage women to consider options previously considered to be primarily, if not exclusively, male. In addition, gender disparities are more apparent in vocational courses, and not professional courses. This suggests that socio-economic variables also play a part, and is an issue that warrants specific consideration from educators and policy makers.

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<sup>20</sup> Sri Lanka: State of Human Rights 1993 (Law & Society Trust, Colombo, 1994) p 207. At the time of writing more recent data was not available.

In addition, the proportion of women enrolled in technical colleges remains low. Although women have tended to enrol in courses such as home science, tailoring, commerce and business English, and accountancy, only a small proportion of women have enrolled in technical trades and crafts. Clearly, assumptions based on gender operate to inform the choices made by individual women, as well as the guidance provided to students within institutions.



### **3.4 Economic Participation and Labour Laws**

Stereotyped assumptions about gender roles continue to have an impact on the characteristics of women's economic participation. Persistent levels of high unemployment experienced by women suggest the myths or presumptions concerning the role of women as "mother" and/or "secondary earner," whose primary role is child bearing and rearing, continue to have currency.

In this part, the economic status of women is considered in relation to the following elements:

1. Rates of unemployment
2. Employment status
3. Labour laws

#### **3.4.1 Rates of unemployment**

Rates of unemployment among women are almost twice that of men. While the overall rate of unemployment is 13.6%, the rate of female unemployment is significantly higher at 21 per cent.<sup>21</sup> Conversely, the rate of male unemployment is lower at 9.9 per cent. Moreover, while the overall rate of female unemployment was 21.1% in 1993, the rate of female urban unemployment was almost a third at 27.9 per cent.

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<sup>21</sup> See *supra* n 1

**TABLE 4 Rates of Unemployment by Gender<sup>22</sup>**

| Year    | Total | Male | Female |
|---------|-------|------|--------|
| 1985/86 | 14.1  | 10.8 | 20.8   |
| 1990    | 14.0  | 9.1  | 23.4   |
| 1993    | 13.6  | 9.9  | 21.0   |

It is likely that the actual rate of female unemployment is higher since those who have sought employment repeatedly may be discouraged and are no longer seeking employment. It has been estimated that an increasing number of women are resorting to self employment, despite its precariousness. Of particular concern is the increasing number of women with low incomes and low levels of educational attainment who are seeking or employed as migrant domestic workers.

### 3.4.2 Employment status

The following figures show rates of employment by sector and sex (excluding the North East) of those employed, roughly a third (34.8)% were women in 1993. The participation of women in paid employment has increased marginally (3.3%) since 1985/86.<sup>23</sup> During 1989/90, 7% of administrators and managers were women.<sup>24</sup>

In this context, the extent to which child care is provided is considered. Sri Lanka does not provide child care as

<sup>22</sup> Excludes the North East. See *supra* n 1.

<sup>23</sup> *Sri Lanka: State of Human Right 1993* (Law & Society Trust, Colombo, 1994) p 215

<sup>24</sup> *The Human Development Report*, p 144

a common public facility. It is tentatively suggested that at policy level, the emphasis has been on the well-being of the child, rather than providing facilities which enable or enhance employment opportunities for women. While women of high socio-economic status may have other options available, such as paid home care, those on low incomes have fewer options available in relation to child care making it difficult to secure paid work outside the home.

Currently, in some urban areas municipalities provide day care centres. These had initially served as "milk feeding centres" which had catered to mothers on low incomes who worked as labourers. Of the 250 public day care centres in 19 districts, the majority are run by NGOs or religious institutions, and are located in Colombo, Kandy and Kegalle. Some of the centres levy fees.

Interestingly in industries where female labour is valued child care is provided by the employer. Estate management provide day care centres in the tea plantation sector where all adult women and most grown up girls are employed as tea pluckers. It is estimated that 1,425 such centres exist. Here the provision of child care facilitate women's economic participation where the arrangement benefits the employer.

### **3.4.3 Labour laws**

Labour legislation in Sri Lanka was formulated in the late 1930s after much agitation by trade unions and on the model provided by Britain. The relevant labour laws in force in the organised sector are:

- \* Maternity Benefits Ordinance No. 32 of 1939 as amended by No. 35 of 1946; No. 26 of 1952; No. 6 of 1958; No. 24 of 1962; No. 1 of 1966; No. 13 of 1978; and No. 43 of 1985
- \* Factories Ordinance No. 45 of 1942
- \* Shop and Office Employees Act No. 19 of 1954
- \* The Employment of Women, Young Persons and Children Act No. 47 of 1956
- \* Employees' Provident Fund Act No. 15 of 1958
- \* Mines and Minerals Act No. 4 of 1973
- \* Wages Boards Ordinance No. 27 of 1941

No specific legislation has been formulated *vis-a-vis* discriminatory employment practices which serve to perpetuate the economic subordination of women. Besides the imperatives posed by provisions in the Constitution and the requirements of CEDAW, no special measures have been formulated at either the legislative or administrative level to ensure equality of treatment and participation. However, a Commission on the Elimination of Discrimination was established to inquire into discrimination in the private sector. A few cases of gender discrimination have been drawn to the attention of the Commission.

All legislation dealing specifically with women workers are protective by nature and tend to be extremely protective of clerical and skilled female workers. Although, such work is less hazardous, white collar workers are afforded greater protection than their blue collar counterparts. Generally women who work in retail outlets, shops and offices cannot be required to work after 6 p.m. and before 6 a.m., but those who work in factories can be employed until 8 p.m. In addition, women who work in shops and offices cannot

be employed for more than nine hours a day, while their counterparts cannot work more than 12 hours a day.<sup>25</sup>

The issue of protective legislation poses many conflicting dilemmas. For example, in the demand that nightwork be eliminated for women, issues associated with nightwork have been exacerbated by government policy. The government seeks to attract multi-national investment in the Export Promotion Zone of the GCEC, where 75% of the workforce constitute female labour in semi-skilled assembly line operations.

It is noted that the electronics industry requires three shifts, wherein one is from 10 p.m. to 5 a.m. There is clear preference for female labour which is perceived to be "cheap" and "docile." The Sri Lankan State has chosen to support these conditions of employment, and has subsequently withdrawn from the ILO Convention on Nightwork, of which Sri Lanka was a signatory. However, it is noted that while many trade unions have opposed nightwork, many women interviewed on this issue stated that they would work night shifts if it augmented their incomes.

Since the labour laws were constructed in the 1930s they frequently do not take account of current economic trends. For example, a large proportion of female workers who emigrate to West Asia work in unskilled labour or as housemaids. While these migrant women workers are perceived to be a "national investment" to varying degrees, more recently action has been taken to alleviate problems which arise from their social and economic vulnerability,

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<sup>25</sup> See *supra* n 6

compounded by the uncertainties characteristic of an alien environment. The impact of such large scale migration on family roles, children and marital relationships is also the subject of some attention.

Moreover, a Foreign Employment Bureau has been established in the Ministry of Labour to monitor the activities of agencies dealing with such employment. Importantly, one of the functions of the Bureau is to provide guidance to women migrant workers. Sri Lankan embassies have been asked to pay special attention to the situation of Sri Lankan women workers in their respective posts. Finally, in 1994, Sri Lanka became a signatory to ILO Convention No. 144 which deals with migrant workers, and state action on this matter is awaited.

Similar exploitation also appears to occur within Sri Lanka in relation to the terms and conditions under which women are employed as domestic workers. Conditions of domestic labour are unregulated, and workers are often required to work long hours without adequate remuneration. It is noted that these women often support families with their income and are often unskilled, and are therefore vulnerable to exploitation. There have been repeated calls for protective legislation in this area. It has been argued that registration, flexible remuneration, and means of redress may facilitate equitable working conditions. Such an approach would bypass the problems associated with implementing criminal injunctions against certain types of labour practices.

A further area of concern relates to the "informal sector" wherein labour laws do not apply. Women engaged in unpaid agricultural work, petty trade and home industry are segregated



as an occupational category. As has been observed, these women are "unprotected by legislative controls, untouched by technological innovation... trapped in what constitutes a large female labour reserve." Most of these women live on the fringes of society, often abandoned by their husbands, and attempting to eke out a living through informal arrangements. Registration, remuneration standards, and consumer protection laws would destroy their minimal gains. What is necessary in this sphere is not protective legislation, but training, developmental assistance, and exposure to technological innovation.

Home based production for certain enterprises where women work from home as "independent contractors" without any bargaining power or freedom of association warrants attention. No legislative framework currently exists to protect these workers, who straddle the dual responsibilities of work and family.

Finally, prostitution as a means of employment is considered in this section, although it is acknowledged that prostitution is perceived to be a form of violence against women. Laws regarding soliciting prostitution, procuring for prostitution, and keeping brothels are outmoded.<sup>26</sup> Existing laws neither offer protection to women who are vulnerable and exploited nor act as a deterrence. It has been argued that prostitution is a viable means of employment, and that the existence of prostitution cannot be eradicated. It is, therefore incumbent upon the state to ensure that female sex workers are protected from violence.

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<sup>26</sup> *Ibid*, p 12

#### **4. Violence Against Women**

In recent times violence against women has been characterised as a violation of women's human rights.<sup>27</sup> In Sri Lanka the problem of violence against women has received attention only in recent years.

At present there is no legislation which specifically deals with domestic violence and sexual harassment even though recent studies, especially that by an NGO called Women in Need (WIN) states that domestic violence may be as high as 60% among couples in a particular sector. In addition, rape laws which were enacted in 1890 do not reflect recent trends which are more protective of women victims. Legislation covering rape and sexual violence has not addressed the special issues associated with these offences committed in a custodial context, such as in police custody or domestic labour. Due to the vulnerability of women in these situations, it is imperative to formulate appropriate safeguards which ensure the protection of these women.

However, during the past few years, there has been a change of approach. In September 1993, special units in major police division head offices were created for the prevention and detection of, as well as investigation into offences of violence against women and child abuse. There are few refuge centres or shelters to which women can go when they feel that they and/or their children are threatened within the home. These shelters are run by NGOs, and serve as temporary shelters, but are primarily in Colombo.

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<sup>27</sup> See UN Declaration on the Elimination of Violence Against Women 1993

The Department of Social Services maintains a detention centre, which originated as a custodial centre. Abused women who seek shelter at the centre are frequently labelled as "offenders" and rehabilitation of these women has been problematic given the stigma attached to the organisation.

It is critical that Sri Lanka formulates a national plan of action to eliminate violence against women, and to meet the requirements and standards provided in international instruments. Legislative provisions must be accompanied by services for women which necessarily include shelters and refuges for women who are victims of domestic violence. Specialist training of police and judicial personnel, concomitant with a systematic attempt to compile data on this subject is long overdue.

Militarisation of society has always led to increases in violence in general, and against women in particular. The ethnic conflict in Sri Lanka, and the JVP insurrection carry a legacy of violence. Societies which evolve from non-violent forms of conflict resolution have less incidence of violence against women than those who resort to violence.<sup>28</sup> In Sri Lanka, women refugees, widows and female heads of households resulting from armed conflict, are serious problems which require immediate intervention. In addition, violence against women migrant workers is also of important concern. In this context, a general climate of democracy, participation and non-violence will help in the struggle to eliminate violence against women.

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<sup>28</sup> See Coomaraswamy, R., *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences* (presented at the 51st session of the Commission of Human Rights) E/CN.4/1995/42.22 (22 November 1994)

## 5. Conclusion

This appraisal has utilised a number of legal and socio-economic indicators to ascertain the status of women in Sri Lanka. In conclusion, some brief observations are made. Many of the indicators suggest that the status of women has improved, to varying degrees in different areas. Some of the prevalent issues are low levels of political representation, unequal pay and access to paid work, and insufficient protection against domestic violence.

While statistical information on levels of employment is encouraging, it is noted that the Sri Lankan workforce remains highly sex-segregated, and that women are concentrated in low or semi-skilled areas where rates of remuneration are poor. Representation of women in managerial positions and in public life continue to be disproportionate. Notions of pay equity and broadbanding have yet to inform the workplace. Moreover, it is noted that women have yet to actively participate in trade unions.

Issues associated with the private arena, such as domestic violence, custody and laws governing family relations remain peripheral to government policies and initiatives. Any assessment of the status of women, irrespective of the status accorded in the public sphere, must necessarily take account of their status in the private arena.

It appears that a dual approach, which is not necessarily complementary, has been adopted in relation to women. On the one hand, there is recognition of societal compensation for motherhood, exemplified by the maternity allowance. On the other, the penalisation of motherhood where societal

recognition is lacking is illustrated by the lack of and/or *ad hoc* arrangements regarding child care. Thus, the provision of child care which may offer those women who wish to shoulder the responsibilities of both work and family a choice, is minimal. This is not to suggest that women in Sri Lanka should follow the choices made by women living in other societies. It is, however, to argue, that a choice should be available.

Moreover, the status of women is underpinned by the intersections between ethnicity, gender and socio-economic status. Socialisation processes that contribute to the vocational decisions made by women have contributed to the high levels of unemployment experienced by women who are not skilled or are semi-skilled. The effect of variables such as ethnicity and socio-economic status is illustrated in patterns of unemployment and educational attainment.

One of the basic tenets of human rights is to provide safeguards against abuses of power. While this is guaranteed by the powers conferred upon the Supreme Court, rates of utility are relatively poor. Access to information and to remedies, as a fundamental right, which guarantees that those individuals whose rights have been denied or violated, is relatively minimal in the context of Sri Lankan women.

It is posited that the government has an obligation to undertake affirmative action strategies designed to ensure that real choices are available to women. Such action may comprise laws, policies, and measures necessary to remedy discriminatory practices evident in the treatment and experiences of women. In seeking to redress inequalities, in order to enable women to enjoy their rights, special programmes are warranted.

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# Schedule I

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1. *International Covenant on Economic, Social and Cultural Rights*
2. *International Covenant on Civil and Political Rights*
3. *Declaration regarding Article 41 of the above*
4. *Convention on the Prevention and Punishment of the Crime of Genocide*
5. *Slavery Convention as amended*
6. *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*
7. *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*
8. *ILO Convention (No. 29) concerning Forced Labour*
9. *ILO Convention (No. 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively*
10. *ILO Convention (No. 135) concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking*
11. *Convention on the Nationality of Married Women*
12. *Convention on the Rights of the Child*
13. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*

14. *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*
15. *Geneva Convention relative to the Treatment of Prisoners of War*
16. *Geneva Convention relative to the Protection of Civilian Persons in Time of War*
17. *International Convention on the Elimination of All Forms of Racial Discrimination*
18. *International Convention on the Suppression and Punishment of the Crime of Apartheid*
19. *Convention on the Elimination of All Forms of Discrimination against Women*
20. *Convention against Discrimination in Education*
21. *ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value*
22. *ILO Convention on Maternity Protection (No. 103)*
23. *ILO Convention on Labour Statistics (No. 160)*
24. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*
25. *Hague Convention Relating to the Inter-Country Adoption of Children*

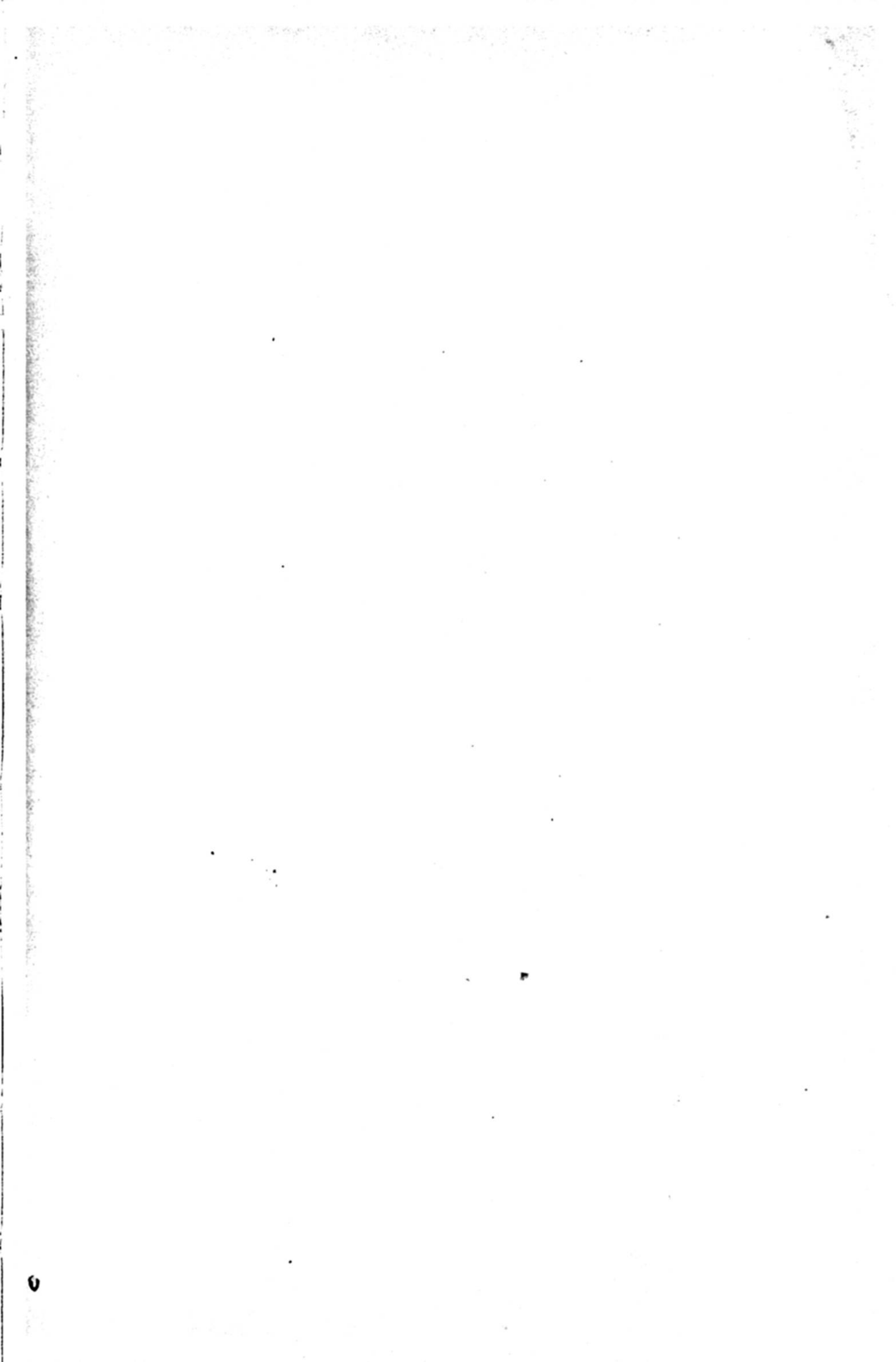
## Schedule II

### UN Human Rights Instruments Not Ratified by Sri Lanka

1. *Optional Protocol to the International Covenant on Civil and Political Rights*
2. *Second Optional Protocol to the above, aiming at the abolition of the death penalty*
3. *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*
4. *ILO Convention (No. 105) concerning the Abolition of Forced Labour*
5. *Declaration regarding Article 21 of the above (relating to the entertainment of complaints by one State Party against another)*
6. *Declaration regarding Article 22 of the above (relating to the entertainment of complaints by individuals)*
7. *Convention on the International Right of Correction*
8. *ILO Convention (No. 102) concerning Minimum Standards of Social Security*
9. *Convention relating to the Status of Refugees*
10. *Protocol relating to the Status of Refugees*
11. *Convention on the Reduction of Statelessness*
12. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

13. *ILO Convention (No. 97) concerning Migrant Workers*
14. *ILO Convention (No. 143) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*
15. *ILO Convention (No. 87) concerning Freedom of Association and Protection of the Right to Organise*
16. *ILO Convention (No. 122) concerning Employment Policy*
17. *ILO Convention (No. 141) concerning Organisations of Rural Workers and Their Role in Economic and Social Development*
18. *ILO Convention (No. 151) concerning Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service*
19. *Convention on the Political Rights of Women*
20. *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*
21. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*
22. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*
23. *Declaration regarding Article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination*
24. *International Convention against Apartheid in Sports*
25. *Protocol Instituting a Conciliation and Good Offices Commission to the UNESCO Convention against Discrimination in Education*
26. *ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation*





# Sri Lanka

## State of Human Rights 1994

This report contains a detailed account of the state of human rights in Sri Lanka, focusing on events which occurred in the country in 1994.

The report considers civil and political rights in relation to the integrity of the person, freedom of expression, judicial protection of human rights and the exercise of political rights, as well as economic, social and cultural rights in relation to the right to health, education and employment. In addition, separate chapters are devoted to the status of women, children's rights, group rights, displaced persons, and the humanitarian law implications of the civil war. Hence, the report represents an important watershed with regard to human rights in Sri Lanka.



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